



OFFICIAL OPINIONS
OF
THE ATTORNEYS-GENERAL

OF
The Commonwealth of Massachusetts.

PUBLISHED BY THE
ATTORNEY-GENERAL.

VOLUME IV.
FROM 1913 TO 1916 INCLUSIVE.

BOSTON:
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ALSO TABLES OF STATUTES AND CASES
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PREFACE.

This volume is issued by the Attorney-General in pursuance of the authority contained in Resolves of 1917, chapter 111, which provides that the Attorney-General shall "collect and publish in a volume properly indexed and digested such of the official opinions heretofore published as an appendix to the annual reports of the attorney-general during the years nineteen hundred and thirteen to nineteen hundred and sixteen, inclusive, as he may deem to be of public interest or useful for reference."

This volume is in substantial uniformity with the preceding volumes. The work of preparation has been in charge of Mr. Louis H. Freese, Chief Clerk.

HENRY C. ATTWILL,

Attorney-General.

BOSTON, January, 1918.

TABLE OF STATUTES CITED OR REFERRED TO IN THIS VOLUME.

UNITED STATES CONSTITUTION.

	PAGE		PAGE
Art. I, § 8, cl. 3,	366	Amendment 5,	139
Art. IV, § 2,	241	Amendment 14,	139, 387, 558
Art. IV,	439		

ACTS OF CONGRESS.

	PAGE
1906, June 29, c. 3592, 34 Stat. 596,	196
1916, June 3, c. 134, 39 Stat. 166,	611

UNITED STATES COMPILED STATUTES.

	PAGE		PAGE
§§ 7981, 8153, 8206,	366	§ 10126,	439
§§ 8283-8285,	582		

CONSTITUTION OF THE COMMONWEALTH.

	PAGE		PAGE
Dec. of Rights, art. 1,	139, 218, 253	Const., c. 1, § 4, art. 1,	215
— art. 2,	421	— c. 2, § 1, art. 1,	259
— art. 10,	483	— — § 1, art. 9,	125, 259
— art. 11,	202	— — § 1, art. 8,	120
— art. 16,	179	— — § 1, art. 10,	536
— art. 18,	420	— — § 3, art. 1,	385
— art. 30,	54	— c. 3, art. 3,	125
Const., c. 1, § 1, art. 3,	44	Amend'ts Const., art. 2,	338
— — § 1, art. 4,	44, 70, 192,	— — art. 8,	457
215, 255, 260, 261, 338, 387		— — art. 11,	420

STATUTES OF THE COMMONWEALTH.

	PAGE		PAGE
1744, c. 30, § 1,	380	1845, c. 163, §§ 3, 4,	84
1784, c. 64,	380	— — § 6, 9,	85
1785, c. 42,	380	1854, c. 226,	277
1830, c. 81,	530	1859, c. 173,	77, 541
1836, c. 131,	276	1866, c. 149, § 4,	527
1845, c. 163,	82	1867, c. 321,	277

STATUTES OF THE COMMONWEALTH — *Con.*

	PAGE		PAGE
1868, c. 313,	277	1903, c. 417,	273
1869, c. 428,	77	— c. 437,	465
— c. 432,	527, 528	— — § 1,	76, 83, 86
1872, c. 236, § 1,	528	— — § 2,	241, 530
— c. 364,	289	— — § 39,	83
1874, c. 347,	528	— — § 40,	75
1875, c. 65,	541, 542	— — §§ 41, 42,	76, 230
1886, c. 296,	380	— — § 90,	231
1887, c. 214, § 68,	505	— c. 452,	624
— c. 435, §§ 2, 3,	229	— c. 459,	342
1888, c. 170,	77	1904, c. 124, §§ 1, 2, 3,	233
1892, c. 433, § 2,	66	— c. 243, §§ 1, 5,	333
— — § 3,	67	— c. 370,	397, 399
1894, c. 276,	173, 174	— — § 2,	582
— c. 288,	324	— — § 3,	405, 426
— c. 288, § 3,	187	— — § 5,	405
1895, c. 444,	155	— c. 395,	475
— c. 483, § 6,	80	— c. 452, § 2,	296
— c. 488, §§ 25, 26,	510, 511	— c. 548, § 8,	409
1897, c. 500, §§ 3, 19,	409	1905, c. 280,	582
— — § 7,	409, 413	— — § 1,	580
— — § 10,	409, 412	1906, c. 171,	544
— — § 17,	34	— c. 210,	128
— — § 21,	410, 412	— c. 244,	623
1899, c. 442, § 17,	403	— c. 256, § 1,	295
— c. 448, § 1,	608	— c. 365,	534
— — § 2,	458, 593	— c. 421, §§ 1, 2,	430, 431
— — § 3,	599, 607	— c. 422,	272, 395, 396
— — § 4,	463	— — § 10,	392
— — § 6,	463, 594, 595	— — §§ 43, 162, 163,	393
— — § 14,	605	— c. 463, part I, § 36,	200
1900, c. 476,	593, 594	— — part II,	95
— — § 1,	459, 463, 464	— — §§ 13-28,	87, 93
— — §§ 4, 6,	459	— — §§ 19-24,	89, 90,
1901, c. 422, § 17,	403	91, 92, 96, 97, 98	
1902, c. 115,	28	— — §§ 65, 71, 78,	127,
— c. 187,	633	— — § 76,	91
— c. 190, § 2,	626	— c. 502,	97
— c. 213, § 1,	474	— c. 502,	625
— c. 534, § 11,	410	1907, c. 203,	185, 186
— — § 12,	411	— c. 215,	625, 627
1903, c. 253, § 1,	428	— c. 386,	474
— c. 332,	403	— c. 394,	618
— c. 402,	359	— c. 396, § 2,	231
— c. 415,	521	— c. 402, § 1,	45

STATUTES OF THE COMMONWEALTH — *Con.*

	PAGE		PAGE
1907, c. 458,	54	1909, c. 382, § 2,	129
— c. 465, § 14,	590	— c. 391,	475, 476
— c. 475,	381	— c. 412, § 1,	86
— §§ 5, 10,	379	— c. 422, § 1,	617
— c. 520,	80	— c. 428, §§ 1, 2, 3,	222, 223
— c. 521, § 1,	256	— c. 486,	453
— c. 556,	276	— §§ 9, 10,	153, 156
— c. 561,	499	— § 18,	515
— § 24,	499, 500	— § 21,	455, 456
— c. 576, § 11,	29, 32, 33	— c. 490, part I, § 4, cl. 4,	499
— § 26, par. 4,	209	— § 13,	446
— § 32, cl. 5,	506, 507, 535	— §§ 14, 15, 23,	534
— § 34,	506, 507, 509, 536	— § 26,	501, 502
— § 37, par. 4,	114, 145	— § 71,	509
— § 47,	552	— part III, § 39,	83
— § 64,	114, 115	— § 40,	221
— § 66,	507	— § 41,	555
— §§ 69, 76, 81,	505	— § 43,	501, 502
1908, c. 108,	61	— c. 491, §§ 1, 4,	190
— c. 142, §§ 1, 2,	212, 213	— c. 504,	81
— c. 253,	195, 196	— § 4,	74
— c. 294,	551	— § 7,	220
— c. 365,	52	— § 8,	80
— c. 375, § 1,	133	— § 10,	82
— c. 422,	212, 213	— § 12,	80
— c. 478, §§ 4, 5,	278	— §§ 17, 18,	164
— c. 502,	398, 405	— §§ 29, 43,	586, 587
— c. 511,	503, 505	— § 58,	80
— c. 512, § 1,	184	— § 76,	587
— c. 520, § 2,	9, 10	— § 82,	588, 589
— c. 562,	453	— § 85,	220
— § 2,	455	— §§ 103, 104,	587
— § 27,	454	— c. 514, § 17,	137
— c. 590, § 16,	190	— § 21,	140, 203
— § 44,	297, 298	— §§ 58, 60,	102
— § 68, cl. 8th,	9, 10	— c. 519,	377
— § 68,	228	— §§ 1, 3, 4,	370
— c. 604, § 132,	538	— c. 526, § 3,	406, 407
— §§ 141, 142, 151, 152,	584	— c. 526, § 5,	406
— 160,	538	— c. 531,	182
— § 191,	124	— c. 534, § 2,	608, 610
1909, c. 133,	62, 111	— § 9,	609
— c. 261,	474, 475, 476	— § 15,	186
— c. 380,	127, 128, 213	— § 17,	7
— c. 382,		1910, c. 223,	398

STATUTES OF THE COMMONWEALTH — *Con.*

	PAGE		PAGE
1910, c. 257, § 4,	102	1911, c. 727, § 21,	563
— c. 273,	52	— c. 731, § 1,	578
— c. 297,	28	— c. 739, §§ 6, 7,	63, 64, 65, 66
— c. 322, § 2,	406	— c. 748,	11, 483
— c. 385, § 1, par. c.,	466	— — § 2,	484
— c. 456, § 1,	83, 86	— — § 4,	12, 450, 487
— c. 462,	182	— — § 5,	12, 361, 485
— c. 493,	506, 509	— — § 12,	363, 484
— — § 1,	508	— — § 17,	450, 451
— c. 519, § 1,	596, 607	— c. 751, part IV, § 23,	31
— — § 6,	596	1912, c. 45,	135
— c. 545,	512	— c. 227,	63
— c. 639,	371, 376	— c. 246,	27
1911, c. 54,	29, 33	— c. 284,	28
— c. 71,	80	— c. 363, § 3,	105
— c. 143, § 1,	147	— c. 379,	152, 518
— c. 162, § 1,	302	— c. 388,	512
— c. 265, § 1,	2	— c. 401, § 1,	503, 505
— c. 269,	102	— c. 448,	16, 100, 390
— c. 281, § 1,	174	— c. 502, § 25,	52, 53
— c. 311,	513	— c. 524, § 1,	38, 40, 41
— c. 315,	29, 33	— c. 531, §§ 5, 28,	590
— c. 395,	467	— c. 533, §§ 2, 3,	57
— c. 397, § 4,	28	— c. 535,	223
— c. 423,	430, 431	— c. 550,	154
— c. 471, § 7,	166, 168	— c. 567, §§ 1, 3, 5,	519
— c. 477,	397, 398, 401	— c. 580, § 1,	225
— c. 494, §§ 1, 2,	141, 142, 293, 294, 303, 443	— c. 586,	76, 79
— c. 532, § 3, par. (4),	105, 106	— — § 1,	75
— c. 534, § 2,	147	— c. 623, §§ 19, 26,	335, 337
— c. 562, § 1,	19	— — § 17,	388
— — § 8,	121, 122	— c. 652, § 2,	564, 565
— c. 614,	518	— — § 4,	2
— — § 9,	152	— — §§ 5, 12,	1
— c. 624, § 1,	128	— — § 8,	565
— c. 628,	402	— c. 702,	287
— c. 628, § 12 b,	403	— c. 706,	494
— — § 29 a, b,	401, 403	— — § 4,	447, 448
— c. 645, §§ 37, 39, 66,	214	— c. 707,	276
— c. 727,	78, 348	— c. 715,	516
— — § 3,	350, 562	— c. 723, § 1,	576, 577
— — § 4,	349	— — § 2,	577
— — § 7,	349, 562	— c. 725, part II, § 2,	91
— — § 10,	350	1913, c. 249,	518
		— c. 330,	494

STATUTES CITED.

xi

STATUTES OF THE COMMONWEALTH — *Con.*

	PAGE		PAGE
1913, c. 356,	159, 160	1913, c. 784, § 2,	597
— c. 368,	578	— — § 16,	87
— c. 396,	159	— — §§ 23, 29,	597
— c. 410,	111, 492	— c. 807,	546
— c. 421,	264	— — § 1, 2,	591
— c. 424, § 1,	117, 118	— — § 5,	546, 591
— c. 443,	288	— — § 6,	256, 591
— c. 452,	427	— — § 7,	591
— c. 464,	470	— c. 831,	118
— c. 471,	629	— — §§ 8, 9,	257
— c. 479,	518	— — §§ 11-15,	567
— c. 484,	173, 174	— — §§ 20, 23,	258
— c. 487, § 1,	151	— c. 832,	325
— c. 494,	153, 154, 156	— — § 6,	326
— c. 529, § 1,	512	— — § 6, par. 5,	340
— c. 538, § 1,	98, 318	— c. 835, §§ 107, 259,	643
— c. 564, §§ 1, 2,	346	— — § 427,	446
— c. 610, § 1,	117, 118	1914, c. 198, § 2,	534
— c. 617, § 5,	402	— c. 368,	447, 494
— c. 619, §§ 1, 2,	137, 138	— c. 398,	315
— — § 5,	138	— c. 453,	512
— c. 633, § 1,	334	— c. 458, § 1,	489
— c. 654, §§ 1, 2,	58	— c. 474,	280
— — §§ 3, 5, 6,	59	— — § 1, 2,	278
— c. 655, §§ 15, 20,	347	— c. 479,	322
— — § 25,	305	— c. 540,	320
— c. 673,	494	— c. 545,	318
— c. 682,	296	— c. 556,	323
— c. 688, § 1,	509	— c. 570,	470
— c. 705,	112, 170	— c. 600,	301
— — § 2,	171	— — § 4,	300
— — § 3,	143, 171	— c. 605,	435
— — § 4,	144, 171	— — § 1, 2, 3, 5,	436
— c. 719, § 3,	149	— c. 630,	469
— — § 5, cl. 15,	134	— c. 643, §§ 6, 22, 25,	388
— — §§ 5, 6, 7,	262	— — §§ 17, 22, 25,	389
— c. 720, § 1,	110	— c. 653, §§ 7, 8,	618, 619
— c. 758,	119	— c. 712,	307, 308
— c. 763,	568	— c. 720, § 2,	636, 637
— — §§ 1, 6,	569	— c. 742,	392, 397
— c. 778,	315	— — § 200,	395
— — § 5,	311	— c. 752,	538
— c. 779, § 1,	102	— c. 766,	374
— — § 4,	331	— — § 1,	375, 379
— — § 18,	104	— — § 2,	373

STATUTES OF THE COMMONWEALTH—*Con.*

	PAGE		PAGE
1914, c. 766, § 3, .	372, 375, 376, 379	1915 (Gen.), c. 296, § 8, .	498
— — — § 4, .	376	— — — c. 301, §§ 5, 14, .	551
— — — § 5, .	373, 376	— (Spec.), c. 326, .	486, 489
— — — § 7, .	375, 379	— — — — § 2, .	488
— — — c. 792, .	404	— — — c. 335, .	483
— — — §§ 2, 3, .	403, 404	1916 (Gen.), c. 98, .	642
— — — §§ 4, 5, 8, .	404	— — — — § 5, .	644
— — — §§ 7, 8, .	299, 300	— — — — § 9, .	643
— — — c. 795, .	330, 399	— — — c. 116, § 1, .	613
— — — § 2, .	581	— — — c. 122, § 2, .	588
— — — § 3, .	581, 400	— — — c. 126, .	583
— — — § 6, .	397, 401	— — — c. 131, .	540
— — — § 10, .	585	— — — c. 158, §§ 1, 2, .	621
— — — § 13, .	581	— — — c. 224, .	562, 563
— — — § 22, .	572	— — — c. 225, § 1, .	576, 577
1915 (Gen.), c. 32, .	499	— — — c. 241, §§ 1, 10, .	575
— — — c. 98, .	466	— — — c. 242, .	567, 634, 635
— — — c. 163, § 1, .	613, 614, 615	— — — c. 285, .	573
— — — c. 174, .	467	— — — — § 9, .	574
— — — c. 212, .	518	— — — c. 288, § 3, .	593, 619
— — — c. 227, .	547	— — — — § 5, .	574
— — — c. 237, § 21, .	509, 510	— — — c. 296, § 10, .	574, 575
— — — c. 289, § 7, .	538	— — — c. 307, § 1, .	591
— — — c. 296, .	496	— — — — § 7, .	592
— — — — § 1, .	497	— — — c. 310, § 1, .	615
— — — — §§ 2, 3, .	631		

RESOLVES.

	PAGE		PAGE
1907, c. 108, .	364	1913, c. 96, .	175, 176
1912, c. 51, .	395	1914, c. 141, .	304

Statute of 43 Elizabeth, c. 4, .	355
----------------------------------	-----

COLONY ORDINANCE.

	PAGE		PAGE
1641-47, .	49, 266	1660, .	639
1649, .	641		

PROVINCE LAWS.

	PAGE
1711, c. 5, .	379

STATUTES CITED.

xiii

PUBLIC STATUTES.

	PAGE		PAGE
c. 80, §§ 40, 41, 75,	534	c. 87, § 7,	81
c. 87, § 6,	80	c. 222, §§ 20, 22,	229

REVISED LAWS.

	PAGE		PAGE
c. 3, § 21,	238, 239	c. 50, § 17,	549
c. 6, § 58,	514, 583	c. 52, §§ 9, 10, 11, 12,	185
c. 7, § 1,	452, 453	— § 26,	606
— § 7,	560	c. 54, §§ 1, 2,	184
c. 8, § 1,	299	c. 55, § 1,	423
— § 4,	308, 547, 550	c. 56, § 70,	16, 100, 101, 390
— § 4, cl. 3,	321, 351	— §§ 40, 70,	637
— § 5, cl. 16,	343	— §§ 51-67,	391
— § 5, cl. 25,	316	— §§ 51-69,	101
c. 12, § 4,	499	c. 57, § 21,	27
— § 5, cl. 3,	353	c. 62, § 3,	28
— § 6,	192	— § 18,	127, 128, 129
c. 13, § 35,	548	— § 43,	182
c. 19,	619, 620	c. 64, § 4,	424
— § 9,	213, 329, 331	c. 65, § 13,	633
— § 13,	173, 174	— §§ 13-29,	515
— § 17,	490, 491	— § 14,	634
c. 25,	540	— § 15,	633, 634, 636
— § 77,	445	— §§ 16, 19,	634
c. 26, § 2,	540	— § 19,	567, 634
c. 29, § 1, par. 2,	126	c. 67, §§ 25, 28,	365, 366, 367
— §§ 10, 12,	406	c. 69,	466
c. 32, §§ 9, 10,	379, 380	c. 75, § 1,	298, 404
— §§ 14, 15,	545	— § 2,	404
— § 28,	381	— § 3,	299, 404
— § 65,	545	— § 42,	534
— §§ 71-77,	429	— § 52,	475
— § 73,	428, 544	— § 57,	474
c. 39, § 19,	353	— § 100,	157
c. 42, § 9,	343	— § 113,	403, 404
— § 18,	419	— § 122,	404
— § 19,	420	— § 139,	627
— § 43,	323	— §§ 136-139,	626
c. 44,	626	c. 76, § 3,	407
— § 6,	625, 627	— §§ 8, 9,	432, 434
c. 48, § 45,	185	— §§ 14, 18,	110
— § 65,	15	c. 77, § 26,	551
c. 49, §§ 23, 33, 45,	548	c. 78, § 38,	406
c. 50, § 10,	548	c. 79, §§ 18, 19,	613, 614, 615

REVISED LAWS — *Con.*

	PAGE		PAGE
c. 81, §§ 17, 18,	569	c. 102, § 78,	19
— §§ 19, 32, 33,	569, 571	— § 113,	405
c. 86, § 22,	629	c. 108, § 36,	424
c. 87, § 120,	589	c. 109, § 1,	530
c. 91, §§ 14, 15,	641, 642	— § 3,	274
— §§ 23, 24, 25,	640	c. 111, § 46,	92
c. 92, § 14,	518, 519	c. 116, § 3,	190
c. 96, § 14,	487	— § 34,	9, 10
— § 16,	487, 488	c. 119, § 12,	403
— § 17,	487, 488, 525, 526	c. 121,	392, 393
— § 18,	169	— §§ 34, 35,	395
— § 22,	526, 527, 528	c. 124, § 1,	123
— § 23,	488	c. 125, § 2,	353
— § 24,	526	c. 128, §§ 93, 94, 100,	18
— § 25,	170	c. 151, § 11,	176
— § 27,	640	c. 160, § 9,	638
c. 97,	450	— §§ 11, 12, 70,	295
— §§ 15-23,	449, 451	c. 165, § 37,	195
c. 100, § 17,	61	c. 175, § 21,	491
— § 22,	111, 492	c. 204, § 29,	52
— § 23,	62, 63, 111	c. 206, § 5,	470
— § 42,	423	c. 217, § 83,	467
— § 47,	61	c. 223, § 30,	490
— §§ 48-51,	430	c. 225, §§ 63, 65, 66,	332, 333
— § 55,	309, 310	— §§ 113, 116,	229
c. 102, § 40,	424	— § 117,	623
— § 41,	563	— § 128,	624
— §§ 57-68,	563	— § 129,	229, 624
— § 59,	423		

TABLE OF CASES CITED IN THIS VOLUME.

	PAGE		PAGE
Adair <i>v.</i> United States, 208 U. S.		Barron <i>v.</i> Smith, 108 Md. 317,	393
161, 173,	23	Bath <i>v.</i> Freeport, 5 Mass. 325,	590
Adams <i>v.</i> Adams, 100 Mass. 365, .	178	Bellows Falls Power Co. <i>v.</i> Commonwealth, 222 Mass. 51, .	555
— <i>v.</i> Holt, 214 Mass. 77, . . .	177	Bickford <i>v.</i> Richards, 154 Mass. 163,	345
Ætna Life Ins. Co. <i>v.</i> Hardison,		Bigelow <i>v.</i> Bemis, 2 Allen, 496,	543
199 Mass. 180,	38	— <i>v.</i> Randolph, 14 Gray, 541, .	201
Allgeyer <i>v.</i> Louisiana, 165 U. S.		Black <i>v.</i> Commissioners of Bun-	
578,	23, 254	combe County, 129 N. C. 121, .	44
American Academy of Arts and		Blair <i>v.</i> Chicago, 201 U. S. 400,	274
Sciences <i>v.</i> Harvard College, 12		Blood <i>v.</i> Nashua & Lowell R.R. Co.,	
Gray, 582,	355	2 Gray, 137,	526
Anderson <i>v.</i> Board of President and		Bohnen <i>v.</i> Metz, 126 App. Div.	
Directors of Public Schools, 26		(N. Y.) 807; 193 N. Y. 676, .	444
L. R. A. 707,	282	Boston <i>v.</i> Brookline, 156 Mass. 172,	185
Ashby <i>v.</i> Eastern Railroad Co.,		— <i>v.</i> Richardson, 105 Mass. 351,	
5 Met. 368,	50	359,	50
Asylum <i>v.</i> Phoenix Bank, 4 Conn.		— <i>v.</i> Schaffer, 9 Pick. 415, .	189
172,	359	Boston & Roxbury Mill Corp. <i>v.</i>	
Atkin <i>v.</i> Kansas, 191 U. S. 207, 223,	24	Newman, 12 Pick. 467, . . .	50
Attorney-General <i>v.</i> Ellis, 198 Mass.		Boston & Worcester R.R. Corp. <i>v.</i>	
91,	170	Old Colony R.R. Corp., 12 Cush.	
— <i>v.</i> McCabe, 172 Mass. 417, .	492	605,	236
— <i>v.</i> New York, New Haven and		Boston Loan Co. <i>v.</i> Boston, 137	
Hartford R.R. Co., 198 Mass.		Mass. 332,	502
413,	369	Boston Molasses Co. <i>v.</i> Common-	
— <i>v.</i> Revere Copper Co., 152		wealth, 193 Mass. 389, . . .	279
Mass. 444,	526	Bourne <i>v.</i> Joint Board of Commis-	
Baker's Appeal, 108 Pa. St. 510,	493	sioners, 221 Mass. 293, . . .	595
Ball <i>v.</i> Wyeth, 99 Mass. 338, . .	543	Braceville Coal Co. <i>v.</i> People of the	
Baltimore & Ohio R.R. Co. <i>v.</i> Inter-		State of Illinois, 147 Ill. 66,	284
state Commerce Commission, 221		Braynard <i>v.</i> Marshall, 8 Pick. 194, .	198
U. S. 612, 619,	71	Brickett <i>v.</i> Haverhill Aqueduct Co.,	
Bandel <i>v.</i> Department of Health of		142 Mass. 394,	249
City of New York, 127 App. Div.		Brightman <i>v.</i> Ætna Ins. Co., 220	
382; 193 N. Y. 133,	406	Mass. 17,	429
Bank of Augusta <i>v.</i> Earle, 13 Pet.		Brodbyne <i>v.</i> Revere, 182 Mass. 598,	
519,	241, 242	600,	42, 43, 44, 187
Barnes <i>v.</i> Mayor of Chicopee, 213		Brown <i>v.</i> Lowell, 8 Met. 172, . .	155
Mass. 1,	260		

	PAGE		PAGE
Brown <i>v.</i> Mullica Township, 48		Commonwealth <i>v.</i> Jones, 142 Mass.	
N. J. L. 447,	394	573, 576,	124
— <i>v.</i> Murdock, 140 Mass. 214, .	534	— <i>v.</i> Kelly, 177 Mass. 221, .	314
Burke <i>v.</i> Holyoke Board of Health,		— <i>v.</i> Kingsbury, 199 Mass.	
219 Mass. 219,	498	542,	186, 189
Burnham <i>v.</i> Morrissey, 14 Gray, 226,	566	— <i>v.</i> McCafferty, 145 Mass. 384,	554
Butler <i>v.</i> Attorney-General, 195		— <i>v.</i> McGann, 213 Mass. 215, .	423
Mass. 79, 83,	50	— <i>v.</i> Martell, 200 Mass. 482, .	523
Coble <i>v.</i> State, 31 Oh. St. 100, .	492	— <i>v.</i> New Bedford Bridge, 2	
Campbell <i>v.</i> Holt, 115 U. S. 620, .	543	Gray, 339,	273
Carr <i>v.</i> Riley, 198 Mass. 70, . .	324	— <i>v.</i> Old Colony & Fall River	
Cassier <i>v.</i> Fales, 139 Mass. 461, .	630	R.R. Co., 14 Gray, 93, . . .	185
Chapin <i>et al.</i> <i>v.</i> Town of Lincoln,		— <i>v.</i> Peoples Express Co., 201	
217 Mass. 336,	262	Mass. 564,	198
Charles River Bridge <i>v.</i> Warren		— <i>v.</i> Perry, 155 Mass. 117, 139, 253,	
Bridge, 7 Pick. 344,	273	254, 255, 282, 284, 523	
Chase <i>v.</i> Boston, 193 Mass. 522, .	502	— <i>v.</i> Phelps, 210 Mass. 78, . . .	198
Chesley <i>v.</i> Nantasket Beach Steam-		— <i>v.</i> Porn, 195 Mass. 443, . . .	434
boat Co., 179 Mass. 469, . . .	198	— <i>v.</i> Riley, 210 Mass. 387, . . .	24
Chicago, Burlington & Quincy R.R.		— <i>v.</i> Roxbury, 9 Gray, 451, . .	49, 640
Co. <i>v.</i> McGuire, 219 U. S. 549,		— <i>v.</i> Sisson, 178 Mass. 578; 189	
569,	23, 69, 72	Mass. 247,	42, 218
City of Boston <i>v.</i> Lecraw, 17 How.		— <i>v.</i> Stodder, 2 Cush. 562, . . .	185
434,	362	— <i>v.</i> Strauss, 191 Mass. 545, . .	140,
Collister <i>v.</i> Hayman, 183 N. Y. 253,	520	560, 561	
Colorado Paving Co. <i>v.</i> Murphy,		— <i>v.</i> Tewksbury, 11 Met. 55, . . .	51
37 L. R. A. 630,	281	— <i>v.</i> Vincent, 108 Mass. 441, . .	51, 269
Commissioners <i>v.</i> Holyoke Water		— <i>v.</i> Weatherhead, 110 Mass.	
Power Co., 104 Mass. 446, . .	274, 530	175,	51
Commonwealth <i>v.</i> Alger, 7 Cush. 53,		— <i>v.</i> Williamstown, 156 Mass. 70,	277
79,	49, 51	— <i>v.</i> Worcester, 3 Pick. 462, . .	491
— <i>v.</i> Bennett, 108 Mass. 27, . . .	43	Conley <i>v.</i> Lackawanna Iron & Steel	
— <i>v.</i> Boston Advertising Co., 188		Co., 88 N. Y. Supp. 125, . . .	427
Mass. 348,	415	Connolly <i>v.</i> Union Sewer Pipe Co.,	
— <i>v.</i> Boston Terminal Co., 185		184 U. S. 540,	424
Mass. 281,	526	Connor <i>v.</i> City of New York, 2	
— <i>v.</i> Breakwater Co., 214 Mass.		Sandford, 355,	260
10,	582	Cooley <i>v.</i> Board of Wardens of Port	
— <i>v.</i> Breed, 4 Pick. 460,	526	of Philadelphia, 12 How. 144, .	367
— <i>v.</i> Cooley, 10 Pick. 37,	310	Coosaw Mining Co. <i>v.</i> South Caro-	
— <i>v.</i> Curtis, 9 Allen, 266,	185	lina, 144 U. S. 550,	275
— <i>v.</i> Ellis, 158 Mass. 555,	554	Copeland <i>v.</i> Springfield, 166 Mass.	
— <i>v.</i> Emerson, 165 Mass. 146, . .	218	498,	155, 393
— <i>v.</i> Hamilton Mfg. Co., 120		Cotter <i>v.</i> Doty, 5 Ohio, 393, . . .	254
Mass. 383,	24	Crowninshield <i>v.</i> Crowninshield, 187	
— <i>v.</i> Hana, 195 Mass. 262,	424	Mass. 221,	189
— <i>v.</i> Jewelle, 199 Mass. 558, . .	434	Cushing <i>v.</i> Worrick, 9 Gray, 382, .	313

	PAGE
Danforth <i>v.</i> Groton Water Co., 178	
Mass. 472,	543
Dartmouth College <i>v.</i> Woodward,	
4 Wheat, 518,	243, 530
Davidson <i>v.</i> Boston & Maine R.R.,	
3 Cush. 91, 105,	50, 235
Davol <i>v.</i> Davol, 13 Mass. 264, . . .	177
Denham <i>v.</i> County Commissioners,	
108 Mass. 202,	15
Devney's Case, 223 Mass. 270, . . .	546
Dexter <i>v.</i> Blackden, 93 Me. 473, . .	254
Donaghy <i>v.</i> Macy, 167 Mass. 178, . .	260
Downey <i>v.</i> Bender, 57 App. Div.	
(N. Y.) 310,	444
Dresel <i>v.</i> Jordan, 104 Mass. 407, 417, .	14
Drury <i>v.</i> Midland R.R., 127 Mass.	
571,	50
Dunbar <i>v.</i> Boston & Providence	
R.R., 181 Mass. 383,	543
Dwyer <i>v.</i> New York, New Haven &	
Hartford R.R. Co., 209 Mass. 419, 237	
Eliot <i>v.</i> McCormick, 144 Mass. 10, . .	198
Ems <i>v.</i> Hudson, 36 Mont. 135, . . .	44
Essex Co. <i>v.</i> Lawrence, 214 Mass.	
79, 87,	85
Evans <i>v.</i> Foss, 194 Mass. 513, . . .	325
Ewen <i>v.</i> Thompson Starrett Co.,	
208 N. Y. 245,	444, 445
Erving <i>v.</i> Burnet, 11 Pet. 41,	313
<i>Ex parte</i> Burnside, 86 Ky. 423, . . .	44
— Quarg, 149 Cal. 79,	208, 520
Fallbrook Irrigation District <i>v.</i>	
Bradley, 164 U. S. 112,	43
Farr Alpaca Co. <i>v.</i> Commonwealth,	
212 Mass. 156,	502
Fay <i>v.</i> Salem & Danvers Aqueduct	
Co., 111 Mass. 27,	267, 268
Fitchburg R.R. <i>v.</i> Boston & Maine	
R.R., 3 Cush. 88,	529
Fitzgerald <i>v.</i> Mayor of Boston, 220	
Mass. 503,	469
Flagg <i>v.</i> Flagg, 16 Gray, 175, . . .	15
Friberg <i>v.</i> Builders Iron & Steel Co.,	
201 Mass. 458,	314
Frorer <i>v.</i> People, 141 Ill. 171, . . .	255
Gage <i>v.</i> Stein Krauss, 131 Mass.	
222,	169

	PAGE
Gallagher <i>v.</i> Hathaway Mfg. Co.,	
172 Mass. 230,	345
Gardner Water Co. <i>v.</i> Inhabitants	
of Gardner, 185 Mass. 190,	269
Gaw <i>v.</i> Ashley, 195 Mass. 173, . . .	148
Georgia R.R. & Banking Co. <i>v.</i>	
Smith, 128 U. S. 174,	275
Gillman <i>v.</i> State, 165 Ala. 135, . . .	492
Greeley <i>v.</i> Hamman, 12 Colo. 99, . .	491
Greenwood <i>v.</i> Freight Co., 105 U. S.	
13,	530
Hammond <i>v.</i> Hyde Park, 195 Mass.	
29,	627
Hampden County <i>v.</i> Morris, 207	
Mass. 167,	197
Harmon <i>v.</i> Inhabitants of New	
Marlborough, 9 Cush. 525,	535
Haverhill <i>v.</i> Marlborough, 187 Mass.	
155,	1
Heathman <i>v.</i> Hall, 3 Iredell, 414, . .	308
Henry <i>v.</i> Newburyport, 149 Mass.	
582, 585,	50
Hickory Tree Road, 43 Pa. 139, . . .	393
Hill <i>v.</i> Boston, 122 Mass. 344, . . .	201, 344
Hillsdale College <i>v.</i> Rideout, 82	
Mich. 94,	305
Hittniger <i>v.</i> Eames, 121 Mass. 539, 169	
Holbrook <i>v.</i> Holbrook, 1 Pick. 248, .	591
Holden <i>v.</i> Hardy, 169 U. S. 366, . . .	24,
	25, 71
Home for Aged Women <i>v.</i> Common-	
wealth, 202 Mass. 422,	237, 526
Hosmer <i>v.</i> Lovelan, 19 Barbour	
(N. Y.), 111,	442
Hunt <i>v.</i> Lucas, 99 Mass. 404,	202
Ill. Cent. R.R. Co. <i>v.</i> La. R.R. Com.,	
236 U. S. 157,	479
<i>In re</i> Dr. Munroe, 5 Mad. Ch. R.	
379,	167
— Goddard, 16 Pick. 504,	491
— James Carroll, 11 Chic. Leg.	
News, 14,	441
<i>In re</i> Northampton, 158 Mass.	
299,	200
Jackson <i>v.</i> State, 131 Ala. 21, . . .	43
Jennings <i>v.</i> Menaugh, 118 Fed. Rep.	
612,	124

	PAGE		PAGE
John P. Squire & Co. <i>v.</i> Tellier, 185		Lyman <i>v.</i> Fiske, 17 Pick. 231,	168
Mass. 18,	521	Mahar <i>v.</i> Steuer, 170 Mass. 454,	492
Johnson <i>v.</i> Walker, 155 Mass. 253,	514	Manuel <i>v.</i> Manuel, 13 Ohio St.	
Joseph <i>v.</i> Bigelow, 4 Cush. 82, 84,	14	450,	299
Jones <i>v.</i> Jones, 18 Me. 308,	177	Martin <i>v.</i> Collins, 165 Mass. 256,	630
— <i>v.</i> Robbins, 8 Gray, 329,	630	McLean <i>v.</i> Arkansas, 211 U. S. 547,	
Kansas <i>v.</i> Colorado, 206 U. S. 46,		548,	69, 72
250, 251		Merchants Legal Stamp Co. <i>v.</i>	
Keefe <i>v.</i> Lexington & Boston Street		Murphy, 220 Mass. 281,	561
Ry. Co., 184 Mass. 183, 185,	47	Metropolitan Life Ins. Co. <i>v.</i> Insur-	
Keene <i>v.</i> Stetson, 5 Pick. 492, 495,	50	ance Commissioner, 208 Mass.	
Keith <i>v.</i> Maguire, 170 Mass. 210,	609	386,	41, 506, 508
Kentucky <i>v.</i> Dennison, 24 How.		Missouri <i>v.</i> Illinois, 180 U. S. 208,	251
66,	439	Molly Varnum Chapter D. A. R. <i>v.</i>	
Ketchum <i>v.</i> City of Buffalo, 14 N. Y.		Lowell, 204 Mass. 487,	354
356,	146	Moore <i>v.</i> Sanford, 151 Mass. 285,	485
Kilty <i>v.</i> Railroad Commissioners,		Mount Hermon Boys' School <i>v.</i> Gill,	
184 Mass. 310, 311, 312,	92	145 Mass. 139,	354
King <i>v.</i> Inhabitants of Barham, 8		Mulcrevy <i>et al.</i> <i>v.</i> City and County	
Barn & C., 99,	312	of San Francisco, 231 U. S. 669,	197
Kittredge <i>v.</i> North Brookfield, 138		Murphy <i>v.</i> Commonwealth, 172	
Mass. 286,	277	Mass. 264,	230
Knoxville Water Co. <i>v.</i> Knoxville,		Myers <i>v.</i> Manhattan Bank, 20 Ohio,	
200 U. S. 22,	275	301,	242
Koch <i>v.</i> State, 126 Wis. 470, 478,	492	Nelson <i>v.</i> State Board of Health,	
Lahar <i>v.</i> Eldridge, 190 Mass. 504,	128	186 Mass. 330,	42, 189
Lakeman <i>v.</i> Burnham, 7 Gray, 437,		— <i>v.</i> State Board of Health, 108	
441,	51	Ky. 769,	407
Lee <i>v.</i> Massachusetts Ins. Co., 6		— <i>v.</i> St. Martin's Parish, 111	
Mass. 208,	14	U. S. 716,	36
Little <i>v.</i> Holyoke, 177 Mass. 114,	202	New England Sanitarium <i>v.</i> Stone-	
Livermore <i>v.</i> Waite, 102 Cal. 113,	393	ham, 205 Mass. 335,	354
Locke <i>v.</i> Motley, 2 Gray, 265,	50	New London & Northern R.R. <i>v.</i>	
Lochner <i>v.</i> New York, 198 U. S. 45,		Boston & Albany R.R., 102	
23, 25, 71		Mass. 386,	200
Logan <i>v.</i> Fidelity & Casualty Co.,		Newton <i>v.</i> Newton, 188 Mass. 226,	185
146 Mo. 114,	507	Nichols <i>v.</i> Boston, 98 Mass. 39,	526
Lord <i>v.</i> County of Essex, 98 Mass.		Nisbett <i>v.</i> Toole, 69 Minn. 104,	439, 440
484,	514	North Bridgewater Bank <i>v.</i> Cope-	
Louisiana <i>v.</i> Pillsbury, 105 U. S.		land, 7 Allen, 139,	1
278,	36, 273	Northwestern Fertilizing Co. <i>v.</i>	
Louisville & Nashville R.R. <i>v.</i> Ken-		Hyde Park, 97 U. S. 659,	275
tucky, 161 U. S. 677,	561	Nye <i>v.</i> Storer, 168 Mass. 53,	209
Louisville R.R. Co. <i>v.</i> Wilson, 138		O'Brien <i>v.</i> City of Woburn, 184	
U. S. 501,	341	Mass. 598,	492
Lowell <i>v.</i> Boston, 111 Mass. 454,		Ohio Railway Commission <i>v.</i> Worth-	
289, 291		ington, 225 U. S. 101,	480, 482

	PAGE		PAGE
O'Keefe v. Somerville, 190 Mass.		People v. Manistee Co., 26 Mich.	
110,	216, 255, 558	422,	492
Olcott v. Supervisors, 16 Wall. 678, .	277	— v. New York, 161 N. Y. 233, .	357
Old Colony Railroad Co., petitioner,		— v. Powers, 231 Ill. 560, .	520
185 Mass. 160,	66	— v. Saline, 176 Ill. 165, .	44
Oliveri v. Atkinson, 168 Mass. 28, .	168	— v. Steele, 231 Ill. 340, .	520
O'Malley v. County, 3 Kulp (Pa.), 41,	394	— v. Wenzel, 105 Mich. 70, .	394
Opinion of Justices (R. I.), 24 R. I.		Peoples Ice Co. v. Davenport, 149	
603,	72	Mass. 322,	169
Opinion of Justices, 8 Gray, 21, .	484	Pine et als. v. New York City, 112	
— 5 Met. 587,	168	Fed. Rep. 98; 185 U. S. 93, .	245
— 14 Mass. 472,	120	Pine Grove Township v. Talcott,	
— 107 Mass. 604,	125	19 Wall. 666,	277
— 117 Mass. 603,	260	Pitney v. Washington, 240 U. S. 387,	558
— 122 Mass. 600,	44	Plumley v. Massachusetts, 155 U. S.	
— 148 Mass. 623,	44	461,	521
— 150 Mass. 595, 598,	44, 162	Portland Bank v. Apthorp, 12 Mass.	
— 155 Mass. 598,	162	252,	216
— 160 Mass. 587,	43	Pratt v. Davis, 224 Ill. 300, .	532
— 163 Mass. 589,	24	Prentice v. Dehon, 10 Allen 353, .	543
— 165 Mass. 599,	260	Price v. Maxwell, 28 Pa. 23, .	355
— 182 Mass. 605, 609,	163, 484	Prince v. Crocker, 166 Mass. 347,	
— 190 Mass. 605, 616,	36, 121, 382	276, 277	
— 196 Mass. 625,	218	Providence Steamboat Co. v. Fall	
— 204 Mass. 607,	291, 485	River, 183 Mass. 535,	200
— 207 Mass. 601,	198	Quinlan v. H. & T. C. Ry. Co., 89	
— 208 Mass. 607,	44, 198, 558	Tex. 356,	393
— 210 Mass. 610,	120	Railroad Co. v. Otoe, 16 Wall. 667, .	277
— 211 Mass. 630,	44	Rast v. Van Deman, 240 U. S. 342, .	558
— 214 Mass. 599,	420, 559	Re Argus Printing Co., 1 N. D. 434,	493
Packard v. Ryder, 144 Mass. 440, .	51	Rea v. Aldermen of Everett, 217	
Page v. Page, 189 Mass. 85,	178	Mass. 427,	431, 432
Parker v. Boston & Maine R.R., 3		Rhode Island v. Massachusetts, 12	
Cush. 107,	271	Pet. 657,	251
— v. Parker, 211 Mass. 139,	178	Richardson v. State, 66 Ohio 108, .	205
Paul v. Virginia, 8 Wall. 168, . . .	242	Riverbank Improvement Co. v.	
Peik v. Chicago, etc., Ry. Co., 94		Bancroft, 209 Mass. 217,	621
U. S. 164,	275	Rockport v. Webster, 174 Mass. 385,	
Pembina Mining Co. v. Pennsyl-		267, 268, 271	
vania, 125 U. S. 181,	530	Rowell v. Doyle, 131 Mass. 474, .	169
People v. Board of Aldermen, 42		Ruhstrat v. People, 49 L. R. A. 181,	255
N. Y. Supp. 545,	321	Runyan v. Coster's Lessee, 14 Pet.	
— v. Coldwell, 168 N. Y. 671, . . .	254	122,	242
— v. Fitch, 154 N. Y. 14,	358	Russell v. Howe, 12 Gray, 147, .	44
— v. Flinn, 189 N. Y. 180,	520	Rutter v. Sullivan, 25 W. Va. 427, .	44
— v. Gillson, 109 N. Y. 389,	255	Salisbury Land & Improvement Co.	
— v. Jackson, 8 Mich. 110,	491	v. Commonwealth, 215 Mass. 371, 516	

	PAGE		PAGE
Sears <i>v.</i> Boston, 1 Met. 250, . . .	167	Sykes <i>v.</i> St. Louis & San Francisco R.R. Co., 127 Mo. App. 326, . . .	299
Seibert <i>v.</i> Lewis, 122 U. S. 284, 290, 36		Taft <i>v.</i> Adams, 3 Gray, 126, . . .	260
Selectmen of Wellesley <i>v.</i> Boston & Worcester St. Ry. Co., 188 Mass. 250, . . .	47	Talbot <i>v.</i> Hudson, 16 Gray, 417, . . .	484
Shannon <i>v.</i> Shannon, 2 Gray, 285, . . .	178	Tanner <i>v.</i> Little, 240 U. S. 369, . . .	558
Shaw <i>v.</i> Spencer, 100 Mass. 382, 395, 40		Teasdale <i>v.</i> Newell & Snowling Construction Co., 192 Mass. 440, . . .	539
Simpson <i>v.</i> Story, 145 Mass. 497, . . .	394	Texas & New Orleans R.R. Co. <i>v.</i> Sabine Tram Co., 227 U. S. 111, . . .	479
Sim's Case, 7 Cush. 285, . . .	198	Thompson <i>v.</i> Dolliver, 132 Mass. 103, . . .	493
Sinking Fund Cases, 99 U. S. 700, . . .	530	The Scow No. 1, 169 Fed. Rep. 717, . . .	582
Slater <i>v.</i> Gunn, 509 Mass. 514, . . .	641	Trowbridge <i>v.</i> Brookline, 144 Mass. 139, . . .	271
Slaughter House Cases, 16 Wall. 36, 254		United Firemen's Ins. Co. <i>v.</i> Thomas, 82 Fed. Rep. 406, 408, . . .	40
Smith <i>v.</i> Mayor of Haverhill, 187 Mass. 323, . . .	128	United States <i>v.</i> Knight, 14 Peters, 315, . . .	433
Smith <i>v.</i> Porter, 10 Gray, 66, 68, . . .	14	— <i>v.</i> Morris, 14 Peters, 464, 475, . . .	119
Somerset <i>v.</i> Dighton, 12 Mass. 383, . . .	1	Walcott <i>v.</i> Swampscott, 1 Allen, 101, 345	
Southern Pacific Terminal Co. <i>v.</i> Interstate Commerce Commission, 219 U. S. 498, . . .	480, 482	Waltham Bank <i>v.</i> Waltham, 10 Met. 334, . . .	502
Southern Ry. Co. <i>v.</i> Railroad Commissioners of Indiana, 236 U. S. 439, . . .	582	Waters-Pierce Oil Co. <i>v.</i> Texas, 177 U. S. 28, . . .	243
Sprague <i>v.</i> Dorr, 185 Mass. 10, . . .	42	Watuppa Reservoir Co. <i>v.</i> Fall River, 147 Mass. 548, 557, . . .	51
— <i>v.</i> Minon, 195 Mass. 581, 268, 271		Warren <i>v.</i> Para Rubber Shoe Co., 166 Mass. 97, . . .	209
Spring Vale Water Works <i>v.</i> Shottler, 110 U. S. 347, . . .	530	Wellington, petitioner, 16 Pick. 96, . . .	484
Springfield <i>v.</i> Connecticut River R.R. Co., 4 Cush. 71, . . .	185	West Roxbury <i>v.</i> Stoddard, 7 Allen, 158, . . .	640
Starkweather <i>v.</i> American Bible Society, 72 Ill. 50, . . .	242	Weston <i>v.</i> Sampson, 8 Cush. 347, 354, . . .	51
State <i>v.</i> Board of Control, 85 Minn. 189, . . .	356	White <i>v.</i> Phillipston, 10 Met. 108, . . .	345
— <i>v.</i> Crawford, 58 Ore. 116, . . .	492	Worcester <i>v.</i> Platt, 128 Mass. 367, 372, . . .	40
— <i>v.</i> Hooker, 22 Okla. 712, . . .	299	— <i>v.</i> Wilbraham, 13 Gray, 586, . . .	168
— <i>v.</i> Loomis, 115 Mo. 307, . . .	284	Worden <i>v.</i> New Bedford, 131 Mass. 23, . . .	202
— <i>v.</i> Robitshek, 60 Minn. 123, . . .	491	Work <i>v.</i> Corrington, 34 Ohio State, 64, . . .	438
— <i>v.</i> Standard Oil Co., 61 Neb. 28, 243		Wright <i>v.</i> Oakley, 5 Met. 400, . . .	395
— <i>v.</i> Starkey, 49 Minn. 503, . . .	321	Wyeth <i>v.</i> Cambridge Board of Health, 200 Mass. 474, 481, . . .	42
Stimson <i>v.</i> Brookline, 197 Mass. 568, 237		— <i>v.</i> Richardson, 10 Gray, 240, . . .	440
Stone <i>v.</i> Charlestown, 114 Mass. 214, . . .	43		
Strouse <i>v.</i> American Credit Indemnity Co., 91 Md. 244, . . .	211		
Sullivan <i>v.</i> Boston, 126 Mass. 540, . . .	201		
Supervisors of Election, 114 Mass. 247, . . .	54		

OPINIONS
OF
JAMES M. SWIFT, ATTORNEY-GENERAL.

STATUTE — LIMIT OF TIME FOR HOLDING ARTICLES OF FOOD
IN COLD STORAGE — PROSPECTIVE IN EFFECT.

The provision of St. 1912, c. 652, § 5, that "no article of food shall be held in cold storage within this commonwealth for a longer period than twelve calendar months, except with the consent of the state board of health as hereinafter provided," is not retroactive in effect and is not applicable to goods received into cold storage previous to Sept. 1, 1912, the date upon which such statute took effect.

You have requested my opinion as to whether, under section 5 of chapter 652 of the Acts of 1912, providing that "no article of food shall be held in cold storage within this commonwealth for a longer period than twelve calendar months, except with the consent of the state board of health as hereinafter provided," with reference to goods received into cold storage previous to Sept. 1, 1912, the period of twelve calendar months is to be construed as running from the date when the food was actually received into cold storage or from the first day of September, 1912, the day upon which, under the provisions of section 12, the act took effect.

To the
State Board
of Health.
1913
January 1.

In my opinion the period of twelve months is to be considered as running only from the first day of September, 1912. Statutes are considered prospective unless the language is such as to show clearly that they were intended to be retrospective. *North Bridgewater Bank v. Copeland*, 7 Allen, 139; *Haverhill v. Marlborough*, 187 Mass. 155; *Somerset v. Dighton*, 12 Mass. 383. The statute in question contains no provision indicating that it was the intent of the Legislature that it should have a retroactive effect. On the contrary, section 12 contains the simple and unqualified provision that the act shall take effect on the first day of September, 1912.

For the purposes of administration of the law, it would seem that no other construction is possible. Section 4 provides that all articles of food *when deposited* in cold storage shall be marked plainly with the date of receipt on the containers in which they are packed, but it would hardly be practicable to determine the date of receipt of goods received into storage before Sept. 1, 1912, in the absence of such markers.

SOLITARY CONFINEMENT — JUVENILE REFORMATORY SCHOOL—
INMATE — OFFICER — “CONSTANT SUPERVISION.”

Under the provisions of St. 1911, c. 265, § 1, that “it shall be unlawful for the officers of any juvenile reformatory school to place an inmate in any cell, room or cage in solitary confinement,” the term “solitary confinement” imports an involuntary restraint in solitude, as a disciplinary penalty for some offence committed; and if the assignment of an inmate of such a school to a separate room is not made as a punishment for an offence committed while an inmate thereof, but is due merely to the segregation of inmates in the ordinary management and discipline of the school, or is a part of the treatment for the correction of moral delinquencies or physical defects, it does not constitute solitary confinement within the meaning of such provision.

Under the further provision that, “whenever restraint or separation from the other inmates is necessary, confinement shall be permitted only in a place where the inmate is under the constant supervision of an officer of the school,” an inmate of such a school may be confined alone in a cell, room or cage if such confinement is not in the nature of a punishment, or may be confined in a cell, room or cage as a punishment, provided he is under the constant supervision of an officer of the school.

The term “constant supervision,” as used in St. 1911, c. 265, § 1, does not mean the continuous or uninterrupted presence of an officer in the same cell, room or cage with the inmate, but requires a special supervision or observation sufficiently close to keep such officer constantly informed of the conduct and situation of such inmate.

Under the provisions of St. 1911, c. 265, § 1, inmates of juvenile reformatory schools occupying their own single bedrooms at night, with the doors closed and opening off and upon either side of a long corridor, are not so separated from the other inmates as to require constant supervision by an officer of such school, but if an inmate is, for disobedience, confined alone in such a bedroom, either with or without further physical restraint, such confinement would require the constant supervision of such officer.

In behalf of the trustees of the Massachusetts Training Schools you have submitted to me several questions as to the interpretation of St. 1911, c. 265, § 1, which provides as follows: —

To the
Trustees of
Massachusetts
Training
Schools.
1913
January 15.

It shall be unlawful for the officers of any juvenile reformatory school to place an inmate in any cell, room or cage in solitary confinement. Whenever restraint or separation from the other inmates is necessary, confinement shall be permitted only in a place where the inmate is under the constant supervision of an officer of the school.

Since the answer to the seventh question is really the key to the answers to all the questions, it may serve to simplify the discussion if I answer first the question which you have propounded as the seventh.

7. What constitutes solitary confinement in a cell, cage or room within the meaning of these terms as used in said statute?

The term "solitary confinement," in its ordinary use, has a technical meaning, of which the essential element is involuntary restraint in solitude as a disciplinary penalty for some offence committed. The restraint is usually in a special place, stripped of bodily comforts except such as are necessary to maintain health, and designed in the simplicity of its equipment to have, so far as possible, a chastening effect upon the occupant. The solitude consists not only of being alone but of being deprived of intercourse with others except for the conveyance of food and other necessary purposes.

The term as used in this statute is, in my opinion, to be construed as used in its technical sense so far as that construction is consistent with the other terms of the act. Assuming that the act was intended to apply to the Industrial School for Girls, the Legislature must be presumed to have had knowledge of the tendencies of many of the inmates of the school and of the methods of administration which it is necessary to adopt to meet and correct those tendencies. The Legislature must also be presumed to have knowledge of the fact that the construction of the buildings of the institution is specially adapted to the needs of the inmates, with single rooms opening from common corridors. The statute is to be construed reasonably and in accordance with the intent of the Legislature so far as that intent may be determined. In the absence of express provision to accomplish the result, it is not to be supposed that

the Legislature, by the enactment of this statute, intended to affect the normal administration of the school, or to alter the methods by which the needs of the inmates were ministered unto, or to cause to be changed the physical structure of the buildings. The effect of the statute is merely to prohibit the trustees from using certain recognized forms of punishment for offences committed in the school. If the assignment of an inmate to a single, separate room is not made as a punishment for an offence committed while an inmate of the school, but is merely due to the segregation of inmates in the ordinary management and discipline designed for the benefit of all the inmates of the school, or is a part of the ordinary treatment for the correction of moral delinquencies or physical defects, it does not constitute solitary confinement within the meaning of the act.

Resuming, then, the order in which the questions have been asked by you:—

1. Does this act absolutely prohibit the placing of an inmate of a juvenile reformatory institution alone, by himself or by herself, in “any cell, room or cage?” Or does it permit it when the inmate is under “constant supervision” of an officer?

In my opinion the statute does not prohibit the placing of an inmate of a juvenile reformatory institution alone in a room if it is not done as a punishment. It does not prohibit placing such inmate alone in a cell, room or cage, if, while kept in the cell, room or cage, he or she is under the constant supervision of an officer, for the reason that if he or she is under the constant supervision of an officer, as “constant supervision” is hereafter defined, he or she is not technically in solitary confinement.

2. What does the phrase “constant supervision” of an officer, as used in this statute, mean? Does it mean absolutely the continuous or uninterrupted presence of an officer with the inmate, or does it mean only a special supervision or observation, intermittent, but at regular or recurring intervals, sufficiently frequent to secure the well-being of the inmate? If an intermittent or recurring period is sufficient, how long may this intermission be?

In my opinion the term "constant supervision" does not mean the continuous or unintermittent presence of an officer in the same cell, room or cage with the inmate, but rather a special supervision or observation of the inmate, sufficiently close and immediate to keep the officer informed of the conduct of the inmate and to insure detection of any act or attempt of the inmate which might affect his or her well-being. The statute does not by its terms require that the confinement shall be in the actual presence of an officer, and the usual distinction between a thing done by or in the presence of a person and a thing done under the supervision of a person is not to be overlooked in the construction of this statute. The question as to the degree in which the observations may be intermittent is, of course, purely a matter of administration of the school which will be affected by consideration of the peculiar characteristics and requirements of each individual offender. It is, therefore, impossible for me to express an opinion in a form more specific than that the supervision shall be sufficiently constant and immediate to meet the needs of each individual case.

3. Are inmates occupying their own single bedrooms at night with the doors closed, and opening off, on either side of, a long corridor, so "separated from the other inmates" as to require "constant supervision of an officer" within the meaning of this statute? (It may be assumed in this question that officers occupy bedrooms on the same floor.)

Assuming that the inmates are merely occupying their own bedrooms in the usual course of their life at the school, and not as a penalty for an offence committed at the school, the question is, in my opinion, clearly to be answered in the negative. The mere fact that the inmates occupy single bedrooms does not of itself constitute separation as contemplated by the act.

4. Does the situation where inmates are sent for disobedience to their own bedrooms, alone, and told to close the door and remain within, without other means of detention, constitute solitary confinement in a "cell, room or cage" within this act? Does such a situation call for "constant supervision of an officer?"

Considering the phraseology of the statute, including the word "room," without qualification, as a contemplated place of confinement, I am of the opinion that the trustees should adopt a construction of the statute requiring constant supervision in such a situation as that presented by this question. Here, again, the nature of the constant supervision required would vary according to the disposition of the inmate, the seriousness of the offence committed, and the temper of the inmate at the time of confinement. The supervision required by the statute in this situation will naturally differ widely from that required in the case of an inmate locked in a room and restrained in such a manner as to prevent physical violence.

5. If an inmate is in his or her own single bedroom for cause, and is handcuffed or otherwise restrained there, to prevent harm to him or herself, or to prevent destruction of the furniture or property in the room, does this bedroom become "a cell, room or cage" within this act?

While the inmate's own room could not be considered as a place of solitary confinement except under the phraseology of an act manifestly aimed at limiting and restricting the use of the ordinary modes of discipline, I am of the opinion that the term "cell, room or cage" should be considered by the trustees as sufficiently broad to include the inmate's own bedroom, and that therefore the inmate so restrained should be given such constant supervision as would be adapted to the needs of the situation.

6. Is sending one or more inmates to the third floor of a cottage to sleep in single bedrooms (the rooms being more isolated than in question 3), the doors of which are not locked, but in which the inmate is supposed to remain for the night with the door closed, either such separation from the other inmates, or such restraint, or such confinement, within the words of this act, as to require the "constant supervision" as used in this act?

If the word "sending" is to be considered as having merely the meaning of "assigning," and such assignment of rooms is not made as a penalty for an offence, I am of the opinion that the assignment is not subject to the provisions of the statute.

If, however, the word "sending" is to be considered as having the significance of sending as a penalty for an offence, I am of the opinion that whether the doors of the rooms to which the inmates are sent are locked or unlocked, constant supervision, as applicable to the circumstances of the case, is required by the terms of the act.

CITY AND TOWN — REGULATION OF TRAFFIC — VEHICLES —
MASSACHUSETTS HIGHWAY COMMISSION — APPROVAL.

An ordinance of a city regulating the use of the streets, sidewalks and highways therein, and relating to vehicles of all kinds, both "motor and horse-drawn," does not require the approval of the Massachusetts Highway Commission under the provisions of St. 1909, c. 534, § 17, that "the city council of a city . . . may make special regulations as to the speed of motor vehicles and as to the use of such vehicles upon particular ways, and may exclude such vehicles altogether from certain ways; provided, however, that no such special regulation shall be effective . . . until after the Massachusetts highway commission shall have certified in writing, after a public hearing, that such regulation is consistent with the public interests."

Your letter of December 19 states that the Massachusetts Highway Commission has received "a copy of an ordinance and amendment thereto regulating the use of the streets, sidewalks and highways in the city of Lawrence, this ordinance relating to vehicles of all kinds, motor and horse-drawn. The city authorities have referred the matter to the commission, a question having arisen as to whether or not the ordinance should be submitted to this Board for its approval or otherwise, under the provisions of section 17, chapter 534 of the Acts of 1909," and you inquire whether or not the approval of the commission is required in the premises.

The section to which you refer, so far as material, provides as follows: —

The city council of a city or the board of aldermen of a city having no common council, and the selectmen of a town, and boards of park commissioners, as authorized by law, may make special regulations as to the speed of motor vehicles and as to the use of such vehicles upon particular ways, and may exclude such vehicles altogether from certain ways; provided, however, that no such special regulation shall be effective unless it shall have been published in one or more newspapers, if there be any, pub-

To the
Massachusetts
Highway
Commission.
1913
January 16.

lished in the city or town in which the way is situated, otherwise in one or more newspapers published in the county in which the city or town is situated; nor unless notice of the same is posted conspicuously by the city, town, or board of park commissioners making the regulation at points where any way affected thereby joins other ways; nor until after the Massachusetts highway commission shall have certified in writing, after a public hearing, that such regulation is consistent with the public interests; . . .

In my opinion this provision was not intended to require that regulations relating to the use of public streets and general regulations of traffic thereon should be approved by the Massachusetts Highway Commission and is applicable only to special regulations as to the speed of motor vehicles and as to the use of such vehicles upon particular ways, including their exclusion therefrom. Since the particular ordinance submitted to said commission involves a general regulation of traffic, and is not a special regulation applicable only to motor vehicles, it follows that the Massachusetts Highway Commission is not required to certify in writing that such ordinance is consistent with the public interests.

TRUST COMPANY — SAVINGS DEPARTMENT — LOAN TO SINGLE INDIVIDUAL.

The limitation in R. L., c. 116, § 34, relating to trust companies, that "the total liabilities of a person, . . . for money borrowed, . . . to such corporations having a capital stock of five hundred thousand dollars or more shall at no time exceed one-fifth part of the surplus account and of such amount of the capital stock as is actually paid up," is inconsistent with the subsequent provision in St. 1908, c. 590, § 68, regulating the investment of deposits in savings banks and the income thereof, that such deposits and income may be invested "in loans of the classes hereafter described, payable and to be paid or renewed at a time not exceeding one year from the date thereof; but not more than one-third of the deposits and income shall so be invested, nor shall the total liabilities to such corporation of a person, partnership, association or corporation for money borrowed upon personal security . . . exceed five per cent of such deposits and income," which provision is made applicable to the savings departments of trust companies by St. 1908, c. 520, § 2, and with respect to deposits and income in the savings department of a trust company is repealed by the provision in § 16 of the latter statute, that "all acts and parts of acts inconsistent herewith are hereby repealed." It follows that the deposits and income in the savings department of such

trust company may be loaned to a person, partnership, association or corporation to the amount of 5 per cent. of such deposits and income, provided that the borrower is not otherwise indebted to the trust company. If, however, a person, partnership, association or corporation borrows to the extent of 5 per cent. of such deposits and income, no further loans may be obtained from the corporation either in its savings department or in its commercial department; and if the loan has already been secured through the commercial department in accordance with the provisions of R. L., c. 116, § 34, the amount so obtained must be considered in determining the amount of any loan from the savings department so that the combined sum of the indebtedness shall not exceed 5 per cent. of the deposits and income of the savings department.

You have submitted for my consideration an inquiry relating to the application of R. L., c. 116, § 34, to the savings department of a trust company. This provision is as follows:—

To the Bank
Commissioner.
1913
February 5.

The total liabilities of a person, other than cities or towns, for money borrowed, including in the liabilities of a firm the liabilities of its several members, to such corporations (trust companies) having a capital stock of five hundred thousand dollars or more shall at no time exceed one-fifth part of the surplus account and of such amount of the capital stock as is actually paid up, . . .

St. 1908, c. 520, prescribing the manner in which a trust company may receive deposits in its savings department, provides, in section 2, that—

All such deposits shall be special deposits and shall be placed in said savings department, and all loans or investments thereof shall be made in accordance with the statutes governing the investment of deposits in savings banks. . . .

St. 1908, c. 590, § 68, which regulates the investment of deposits in savings banks and the income derived therefrom, provides that such deposits and income may be invested:—

Eighth. In loans of the classes hereafter described, payable and to be paid or renewed at a time not exceeding one year from the date thereof; but not more than one-third of the deposits and income shall so be invested, nor shall the total liabilities *to such corporation* of a person, partnership, association or corporation for money borrowed upon personal security, including in the liabilities of a partnership or company not incorporated the liabilities of the several members thereof, exceed five per cent of such deposits and income.

Your specific inquiry is whether or not "the provisions of section 2, chapter 520, Acts of 1908, enlarge or extend the limitations upon personal borrowings as first defined in section 34, chapter 116, Revised Laws, so that it would be legal for a trust company to simultaneously loan the same parties in its banking or commercial department to the limit named in said section 34 and in its savings department to the limit named in the eighth clause of section 68, chapter 590, Acts of 1908."

It is obvious that the limitation in R. L., c. 116, § 34, is inconsistent with the subsequent provision of St. 1908, c. 590, § 68, cl. 8, and since, in the latter statute, it is provided, in section 16, that "all acts and parts of acts inconsistent herewith are hereby repealed," I am of opinion that in respect of such inconsistency St. 1908, c. 590, § 68, cl. 8, should govern, and the deposits and income in the savings department of a trust company may be loaned to a person, partnership, association or corporation to the amount of 5 per cent. of such deposits and income, provided that the borrower is not otherwise indebted to the trust company. Since, however, this clause fixes the total liability of a borrower from such a corporation at 5 per cent. of the deposits and income in the savings department, it follows that, having borrowed to that extent, a person cannot obtain any further loans from the corporation either in its savings department or in its so-called commercial department, and that if he has already secured a loan from the commercial department in accordance with the provisions of R. L., c. 116, § 34, the amount so obtained must be considered in determining the amount of any loan from the savings department, so that the combined sum of his indebtedness shall not exceed 5 per cent. of the deposits and income of the savings department, and that, if such person first secures a loan from the savings department for an amount which exceeds one-fifth of the capital stock of the corporation, he cannot thereafter secure a loan from the commercial department, since his total liabilities "to such corporation" for moneys borrowed already exceeds one-fifth of said capital stock.

COMMONWEALTH PIER — OLD COLONY RAILROAD COMPANY —
LEASE — CANCELLATION — DIRECTORS OF THE PORT OF
BOSTON — AGREEMENT — EXECUTION — DATE.

Where the Directors of the Port of Boston, acting under the authority of St. 1911, c. 748, §§ 4 and 5, executed a contract with the Old Colony Railroad Company, and its lessee, the New York, New Haven & Hartford Railroad Company, by which an existing lease to the Old Colony Railroad Company from the Board of Harbor and Land Commissioners of the Commonwealth Pier, at a quarterly rental of \$17,500, was cancelled, and it was provided that the Old Colony Railroad Company and its lessee should be absolved and discharged from any further obligation or promises under or by virtue of said lease, except the payment of any unpaid rent up to July 1, such agreement being dated "this first day of July, 1912," but not executed in fact until Oct. 10, 1912, the agreement so drawn and executed was effectual to relieve the lessee of the obligation to pay rental for the period of the continuance of the lease after July 1, and the Old Colony Railroad Company or its lessee may justly claim that the rental paid for the months of July and August should be reimbursed to it in accordance with the terms of such agreement.

In view of the fact that the payment was required to be made by force of an existing lease, it may be doubted whether such reimbursement should be made without express authority from the Legislature.

By an instrument dated Nov. 1, 1910, the Board of Harbor and Land Commissioners leased to the Old Colony Railroad Company, for the term of thirty years, the property known as the "Commonwealth Pier," the consideration for said lease being the payment by the company of the sum of \$70,000 yearly, by quarterly payments, as follows: "Seventeen thousand five hundred (17,500) dollars on the first day of March, 1911, and the same sum thereafter on the first day of June, September, December and March in each and every year during said term."

By St. 1911, c. 748, an act relating to the development of the port of Boston, the governor, in section 1, was authorized, with the advice and consent of the council, to appoint three persons, and the mayor of the city of Boston to appoint one person, to constitute the Directors of the Port of Boston. By section 2 the directors so appointed were made the administrative officers of the port, to "cause to be made all necessary plans for the comprehensive development of the harbor," to have immediate charge of the lands now or hereafter owned by the common-

To the Auditor
of the Common-
wealth.
1913
February 6.

wealth upon or adjacent to the harbor front, except lands under the control of the metropolitan park commission or of the metropolitan water and sewerage board, and of the construction of piers and other public works therein, to administer all terminal facilities which are under their control, and to keep themselves thoroughly informed as to the present and probable future requirements of steamships and shipping, and as to the best means which can be provided at the port of Boston for the accommodation of steamships, railroads, warehouses and industrial establishments.

Section 4 is as follows: —

All the rights, powers and duties now pertaining to the board of harbor and land commissioners in respect to such lands, rights in lands, flats, shores, waters and rights belonging to the commonwealth in tidewaters and land under water as constitute that part of Boston harbor lying westerly and inside of a line drawn between Point Allerton on the south and the southerly end of Point Shirley on the north, or as adjoin the same or are connected therewith, and any other rights and powers heretofore vested by the laws of the commonwealth in the board of harbor and land commissioners in respect to any part of said area, are hereby transferred to and hereafter shall be vested in and exercised by said directors. There shall also be transferred to and vested in the directors the right to expend any unexpended funds heretofore appropriated to be expended by the board of harbor and land commissioners in the area above designated, and the right which the board of harbor and land commissioners has heretofore exercised in regard to moneys paid to the commonwealth in accordance with the provisions of section twenty-three of chapter ninety-six of the Revised Laws. Said directors shall also assume and take over, on behalf of the commonwealth, any rights, powers and duties of the board of harbor and land commissioners under any contracts heretofore made for the improvement, filling, sale, use or other disposition of the lands, flats or waters of the commonwealth within said area, including any structures now existing or being built therein or thereon.

Section 5 provides, in part, that —

With the consent of the governor and council, the directors may take or acquire by purchase or otherwise, and hold, such real property and such rights and easements therein as the directors may from time to time consider necessary for the purpose of constructing, or securing the constructing or utilizing of, piers and, in connection therewith, highways,

waterways, railroad connections, storage yards and sites for warehouses and industrial establishments, and may lay out and build thereon and upon such other lands as under section four of this act are under its jurisdiction, such piers, with buildings and appurtenances, docks, highways, waterways, railroad connections, storage yards and public warehouses as, in the opinion of the directors, may be desirable.

Acting under the provisions of, and exercising the very broad powers conferred by, these provisions, the Directors of the Port of Boston entered into negotiations with the directors of the Old Colony Railroad Company and of its lessee, the New York, New Haven & Hartford Railroad Company, looking to the cancellation of the lease already referred to, and a tentative agreement for that purpose was submitted to the Directors of the Port of Boston in a letter addressed to them on July 1, 1912. The actual agreement or contract for such cancellation was not finally executed by said directors until October 10, although it had been executed by the company some days prior to that date, and was not approved by the Governor and Council until November 6. The agreement as originally drawn and finally executed by both parties was dated "this first day of July, 1912," and contained a stipulation that —

The lease dated Nov. 1, 1910, . . . is hereby cancelled and terminated as of the date of this instrument, the Commonwealth assuming full control of said property so leased, and the Old Colony and its lessee the New Haven being absolved and discharged from any further obligation or promises under or by virtue of said lease, except the payment of any unpaid rent up to July 1.

The Old Colony Railroad Company or its lessee, the New York, New Haven & Hartford Railroad Company, upon September 1 paid the quarterly rent as provided for in the lease of Nov. 1, 1910, amounting to \$17,500, and the lessee, the New York, New Haven & Hartford Railroad Company, in view of the terms of the instrument as finally executed, has made formal application to the Auditor of the Commonwealth that such payment, covering the months of July and August, amounting to \$11,666.67, be refunded to it. The matter is now before

me upon your inquiry as to whether the New York, New Haven & Hartford Railroad Company is entitled to the amount claimed by it, and whether, if said company is entitled thereto, it may be paid without further action of the Legislature.

All deeds or contracts should be dated on the day of their execution, and in the absence of other evidence upon the subject it has been held reasonable and safe to conclude in any particular instance that a legal instrument by which property is conveyed was completed on the day on which it bears date. *Smith v. Porter*, 10 Gray, 60, 68. This presumption, however, is subject to proof by extraneous evidence that the instrument was in fact dated upon another day. *Lee v. Massachusetts Insurance Co.*, 6 Mass. 208; *Dread v. Jordan*, 104 Mass. 407, 417.

It is clearly established, however, that the date of a deed or contract is not essential to the validity of the instrument. *Lee v. Massachusetts Insurance Co.*, *supra*; *Joseph v. Bigelow*, 4 Cush. 82, 84. The agreement now under consideration in respect to its validity would not be affected if the date of its execution were entirely omitted. This being so, I am of opinion that the question now raised must depend upon the intention of the parties to the agreement and not upon the date of its execution. Upon its face it purports to be a cancellation of the existing lease from July 1, 1912, and to release the lessee from any obligation to make payments of the rent which accrued after said date. I am advised that the provision that the obligations of the lessee should terminate upon July 1, 1912, was not intended to be dependent upon the date of the actual execution of the instrument, and was designedly retained notwithstanding that such execution was not formally completed until the month of October. Such being the intent of the parties, I am of opinion that the instrument was effectual to relieve the lessee of the obligation to pay rental for the period of the continuance of the lease after July 1, and that the Old Colony Railroad Company, or the New York, New Haven & Hartford Railroad Company, its lessee, may justly claim that the rental paid for the months of July and August should be

reimbursed to it in accordance with the terms of the agreement; but in view of the fact that the payment, when made, was required to be made by force of an existing lease, it is doubtful if such reimbursement should be made without express authority from the Legislature.

CITIES AND TOWNS — PRIVATE WAY — WIDTH AND GRADE — REGULATION — CONSTITUTIONAL LAW.

The term "private way" in its technical sense imports a way laid out under the provisions of R. L., c. 48, § 63, and the following sections, and is, in fact, a public way laid out by public officers for the common necessity and convenience; and the Legislature may authorize a city or town to make ordinances or by-laws controlling the construction of such way with respect to width and grade. Upon the other hand, a way over private land in which the public has no interest cannot be regulated and controlled as to width or grade by the ordinances of a city or the by-laws of a town.

On behalf of the Committee on Cities you have submitted to me the following question of law: "Is it within the power of the Legislature to authorize a city or town to make ordinances controlling the construction of private ways in respect to width and grade; and if such authority were given, would it be possible for a city or town to provide that all private ways must be of a determined width and a grade approved by the proper officials of the city or town?"

To the Senate
Committee on
Cities
1891
February 4.

The term "private way" in its technical sense means a way laid out under the provisions of R. L., c. 48, § 63, and the following sections, and differs from a town way in the fact that the damages occasioned by its being laid out are assessed in whole or in part upon the person or persons for whose benefit it is constructed. *Flagg v. Flagg*, 10 Gray, 175. "Such ways are laid out by public officers as branches of public roads, upon the implied ground . . . that the common convenience and necessity require such laying out." *Denham v. County Commissioners*, 108 Mass. 202. The laying out of either town ways or private ways is not restricted in respect to width and grade, such matters being left to the discretion of the selectmen or road commissioners, to be determined by the public necessity or

convenience in each particular case; but I have no reason to doubt that the Legislature may authorize a city or town to limit the actual construction of such ways in respect to width and grade.

Upon the other hand, a way over private land in which the public has no interest, the way and the land over which it passes being private property, could not be regulated or controlled as to width or grade by the ordinances of a city or the by-laws of a town.

STATE BOARD OF HEALTH — CITIES AND TOWNS — BOARDS
OF HEALTH — RULES AND REGULATIONS RELATING TO THE
KEEPING AND EXPOSURE FOR SALE OF ARTICLES OF FOOD
— APPROVAL — PUBLIC HEARING.

Under the provisions of R. L., c. 56, § 70, as amended by St. 1912, c. 448, that "boards of health of cities and towns may make and enforce reasonable rules and regulations, subject to the approval of the state board of health, as to the conditions under which all articles of food may be kept for sale or exposed for sale" and that "any person affected by such rules and regulations, in the form in which they are presented to the state board of health for approval, may appeal to the said board for a further hearing," the State Board of Health is not required to hold a public hearing before approving rules and regulations submitted to it unless some person affected thereby has applied for further hearing.

To the
State Board of
Health,
1913
February 20.

You have called my attention to the provisions of R. L., c. 56, § 70, as amended by St. 1912, c. 448. The amendment adds to the end of said section 70 certain provisions, which, so far as is material to your inquiry, are as follows: —

Boards of health of cities and towns may make and enforce reasonable rules and regulations, subject to the approval of the state board of health, as to the conditions under which all articles of food may be kept for sale or exposed for sale, in order to prevent contamination thereof and injury to the public health. Before the board of health of any city or town submits such rules and regulations to the state board of health for approval it shall hold a public hearing thereon, of which notice shall be given by publication for two successive weeks, the first publication to be at least fourteen days prior to the date of the hearing, in a newspaper published in such city or town, or, if none is so published, in a newspaper published in the county in which such city or town is located. Any per-

son affected by such rules and regulations, in the form in which they are presented to the state board of health for approval, may appeal to the said board for a further hearing, and said board shall not grant its approval to rules and regulations concerning which such an appeal has been taken until it has held a public hearing thereon, advertised in the manner specified above in this section with reference to hearings before boards of health in cities and towns.

You state that "a hearing was held before the Boston Board of Health in accordance with the statutes, and the rules and regulations were duly presented to the State Board of Health for its approval, which approval was given by the State Board of Health at a meeting held Feb. 6, 1913;" and that you have received a letter "protesting against these regulations and against the action of the State Board of Health in approving the said regulations without a public hearing;" and that "no request for such a hearing was made to the State Board of Health, however, and the Board concluded, therefore, that there was no opposition to such regulations from the citizens of Boston." Upon these facts your inquiry is in substance whether or not the State Board of Health "acted within its rights in approving these regulations without holding an advertised hearing."

In my opinion this inquiry is answered by the provisions above quoted, which require public hearings to be held by local boards of health before making or enforcing any rules or regulations in the premises. The State Board of Health, however, is not required to hold public hearings unless a person affected by such rules and regulations in the form in which they are presented to it appeals to said board for a further hearing, in which case a public hearing, advertised in the same manner as that required for hearings before local boards of health, must be held. If, as I assume from the statement made by you, no appeal was taken to the State Board of Health, it follows that no public hearing was required in this particular case; such hearing being required only upon appeal to the State Board from the form of the rules and regulations adopted by the local board.

LAND — REGISTRATION — ASSURANCE FUND — INCOME.

In R. L., c. 128, relating to the registration and confirmation of titles to land, the provision of § 100, that the income of the assurance fund established by § 93 shall be added to the principal and invested, until it amounts to \$200,000, and thereafter shall be used, as far as may be, to defray the expenses of the administration of the provisions of this chapter, permits the sum accruing from such fund to be used in addition to the annual appropriation made by the Legislature, unless it is provided that such appropriation shall include all other sums previously appropriated for such purpose.

To the Auditor
of the Common-
wealth.
1913
February 21.

You have requested my opinion concerning the provisions of R. L., c. 128, §§ 93, 94 and 100, on the following questions: —

1. Should the assurance fund be increased above the amount of \$200,000 by the amounts received under the provisions of section 93?
2. Can the income from this fund from invested securities be used by the Land Court in addition to the amount which is appropriated by the Legislature for expenses of the court?

R. L., c. 128, §§ 93, 94 and 100, provide as follows: —

SECTION 93. Upon the original registration of land, and also upon the entry of a certificate showing title as registered owners in heirs or devisees, there shall be paid to the recorder one-tenth of one per cent of the assessed value of the land, on the basis of the last assessment for municipal taxation, as an assurance fund.

SECTION 94. All money received by the recorder under the provisions of the preceding section shall be paid to the treasurer and receiver general, who shall keep it invested, with the advice and approval of the governor and council, and shall report annually to the general court the condition and income thereof.

SECTION 100. The income of the assurance fund shall be added to the principal and invested, until said fund amounts to two hundred thousand dollars, and thereafter the income of such fund shall be used to defray, as far as may be, the expenses of the administration of the provisions of this chapter, instead of being added to the fund and accumulated.

I am of opinion that it is the intent of the statute that the assurance fund shall remain untouched until it has reached the sum of \$200,000, and that thereafter the interest thereon shall be used to defray the expenses of the Land Court, and that the payments into the fund of the money received under section 93 shall still continue.

In my opinion the annual appropriation made by the Legislature, unless it states that the sum therein named shall include all other sums previously appropriated for that purpose, does not affect the income from said fund. The sum accruing from said fund may be used in addition to the appropriation by the Legislature in any given year.

LICENSE — STEAM BOILER OR ENGINE — LOCOMOTIVE.

A locomotive used by a railroad company for the purpose of making steam to heat its passenger cars, or for operating steam drills, or for any work necessitating the use of steam power other than the actual work of hauling cars, is within the exemption contained in R. L., c. 102, § 78, as amended by St. 1911, c. 562, § 1, that "no person shall have charge of or operate a steam boiler or engine in this commonwealth, except boilers and engines upon locomotives . . . unless he holds a license as hereinafter provided . . ." and a person in charge of or operating a steam boiler or engine thereon is not required to hold a license therefor.

You have requested my opinion as to whether a locomotive used by a railroad company for the purpose of making steam to heat its passenger cars, or for operating steam drills, or for any work necessitating the use of steam power other than the actual work of hauling cars, is within the exemption contained in the words "except boilers and engines upon locomotives" in R. L., c. 102, § 78, as amended by St. 1911, c. 562, § 1. Section 78, as amended, provides as follows: —

To the Chief of
the Massachusetts District
Police.
1913
February 24.

No person shall have charge of or operate a steam boiler or engine in this commonwealth, except boilers and engines upon locomotives, motor road vehicles, boilers and engines in private residences, boilers in apartment houses of less than five flats, boilers and engines under the jurisdiction of the United States, boilers and engines used for agricultural purposes exclusively, boilers and engines of less than nine horse power, and boilers used for heating purposes exclusively which are provided with a device approved by the chief of the district police limiting the pressure carried to fifteen pounds to the square inch, unless he holds a license as hereinafter provided. . . .

Whether a person operating a boiler or engine is within the exception of the statute depends, by its very wording, upon

whether it is upon a locomotive. There is no restriction as to the use of a locomotive in the enactment. The question whether it is a locomotive or not is determined by its design and its potentiality rather than by any use to which it may be temporarily applied. In the absence of any facts indicating that the locomotive has been changed in form or design, I assume that it is still a steam engine which travels on wheels turned by its own power and is designed and adapted to travel on a railway and has power to haul cars from place to place.

Upon that assumption, it is still a locomotive according to the ordinary acceptance and dictionary definition of that term; and a person in charge of or operating a steam boiler or engine upon such locomotive is exempted from the requirement of holding a license as provided in the statute. If it is desirable to restrict the use of such locomotives merely to hauling cars, new legislation appropriate to that end will be necessary.

CONSTITUTIONAL LAW — HOURS OF LABOR — FAIR, REASONABLE AND APPROPRIATE EXERCISE OF POLICE POWER — QUESTION OF FACT.

The constitutionality of a proposed measure limiting the hours of labor of persons employed in certain designated occupations depends upon the determination of the question whether such measure, if enacted, would constitute a fair, reasonable and appropriate exercise of the police power upon the one hand, or an unreasonable, unnecessary and arbitrary interference with the right of the individual to his personal liberty to make such contracts as he deems necessary or proper upon the other.

In the absence of evidence bearing upon the relation which exists between the occupations so designated and the health of those employed in them, the Attorney-General is not sufficiently advised to pass upon the question of the constitutionality of such proposed measure as a question of law.

It is for the Legislature, in the first instance, to determine, upon the facts and considerations presented to it, whether in its judgment there is fair and reasonable ground to say that there is material danger to the public health or to the health of the employees if the hours of labor in the occupations designated are not curtailed.

To the Joint
Committee on
Labor.
1913
February 28.

The Joint Committee on Labor has submitted to me copies of three bills, providing for the regulation of the hours of employment in certain occupations, and has requested my opinion

as to whether these bills would be constitutional if enacted into law. Senate Bill No. 145 is entitled "An Act fixing hours of employment of employees of express companies," and provides in section 1 as follows: —

The hours of employment of all employees of firms, persons, corporations or associations engaged in the express business in this commonwealth shall be limited to nine hours within eleven consecutive hours: *provided*, however, that in case of emergency an officer or agent of such company may request an employee to work over and above nine hours, time over and above nine hours to be paid extra. On Sundays and legal holidays extra labor may be performed at extra compensation and at request of employees. Intimidation of employees or threats of loss of employment by any officer or agent of any such company shall be considered as coercion and "requiring" within the meaning of this section. Any company or its agent which violates the provisions of this act shall forfeit for each offence not less than one hundred nor more than five hundred dollars.

House Bill No. 47 is entitled "An Act relative to the hours of labor of drug clerks," and provides in sections 1 and 2 as follows: —

SECTION 1. No registered pharmacist, assistant pharmacist, clerk, apprentice or other employee in any pharmacy, drug store or apothecary shop, shall be required or allowed to work more than twelve hours in any consecutive twenty-four, nor more than sixty-five hours in any consecutive one hundred and sixty-eight, except in particular cases in which the board of registration in pharmacy shall grant specific permission, in due accordance with the provisions of this act.

SECTION 2. The board of registration in pharmacy shall have authority to grant permission to any registered pharmacist who is the owner or manager of any pharmacy, drug store or apothecary shop, to request and to allow any registered pharmacist, assistant pharmacist, clerk, apprentice or other employee to work more than twelve hours in any consecutive twenty-four, or more than sixty-five hours in any consecutive one hundred and sixty-eight: *provided*, that such registered pharmacist, assistant pharmacist, clerk, apprentice or other employee shall not be required or allowed to work more than one hundred and thirty hours in any consecutive three hundred and thirty-six.

House Bill No. 1081 is entitled "An Act to regulate the hours of labor of certain employees in paper mills and other industrial

establishments operated day and night," and provides in sections 1, 2 and 3 as follows: —

SECTION 1. No person who is employed as a tour-worker in any paper mill, foundry, factory or any manufacturing or mechanical or other industrial establishment which is in operation both day and night, either continuously or intermittently, shall, except in case of emergency, be required, requested or permitted to work more than forty-eight hours in any one week or more than eight hours in any one calendar day.

SECTION 2. Only a case of danger to property, to life, to public safety or to public health shall be considered a case of emergency within the meaning of this act, except in case of employment for the repair, renewal, adjustment or care of machinery or appliances in order to maintain the same in continuous operation, and except in case of employment of a tour-worker in substitution for and in the temporary absence of another.

SECTION 3. For the purposes of this act the expression "tour-workers" shall mean all employees who tend or are employed for the purpose of tending machinery or appliances of any description which are operated both day and night, either continuously or intermittently, and shall be deemed to include machine tenders and their helpers, engineers and their helpers, calender tenders and their helpers, cutter tenders and all other persons whose attendance is required in consequence of the continuity of operation of such machinery or appliances.

These three bills refer to entirely distinct occupations, and vary in the degree of regulation to which they would subject the employment of labor in these occupations. Each bill therefore must be considered upon its own special provisions and upon its own individual merits.

There are, however, certain general principles of law which are applicable to the entire class of legislation to which these three bills belong, and these general principles may well be briefly stated as a basis for the consideration of the particular bills.

Whether such legislation is unconstitutional or not depends on whether it unwarrantably deprives those who are subject to it of their liberty. The liberty of the individual is guaranteed both by the State and Federal constitutions, and it has been held that the right to make contracts is embraced in the conception of liberty as guaranteed by the Constitution. *Allgeyer v.*

Louisiana, 165 U. S. 578; *Lochner v. New York*, 198 U. S. 45; *Adair v. United States*, 208 U. S. 161; *Chicago, Burlington & Quincy R. R. Co. v. McGuire*, 219 U. S. 549, 566. In the case of *Allgeyer v. Louisiana*, 165 U. S. 578, 589, the court said, in referring to the Fourteenth Amendment to the Constitution of the United States:—

The liberty mentioned in that amendment means not only the right of the citizen to be free from the mere physical restraint of his person, as by incarceration, but the term is deemed to embrace the right of the citizen to be free in the enjoyment of all his faculties; to be free to use them in all lawful ways; to live and work where he will; to earn his livelihood by any lawful calling; to pursue any livelihood or avocation, and for that purpose to enter into all contracts which may be proper, necessary and essential to his carrying out to a successful conclusion the purposes above mentioned.

The right to contract is not, however, an absolute right. It is held subject to certain powers inherent in the sovereignty of each state and of the United States which are known as the "police powers." The police powers are not easily described, and specific limitations of them have not been attempted by the courts. They are somewhat elastic in their nature and grow and vary with public opinion. For present purposes, however, it is sufficient to describe them as the powers which the sovereignty may exercise in relation to the safety, health, morals and general welfare of the public.

In the exercise of those powers the State may subject the property and the liberty of the individual to reasonable conditions without violating the provisions of the Fourteenth Amendment to the Constitution.

The question as to the constitutionality of the bills presented, therefore, resolves itself into the question whether the bills, if enacted into law, would constitute a reasonable exercise of the police power by the governing power of the State. The question was thus expressed by the United States Supreme Court in the case of *Adair v. United States*, 208 U. S. 161, 173:—

In every case that comes before this court, therefore, where legislation of this character is concerned and where the protection of the Federal Con-

stitution is sought, the question necessarily arises: Is this a fair, reasonable and appropriate exercise of the police power of the State, or is it an unreasonable, unnecessary and arbitrary interference with the right of the individual to his personal liberty or to enter into those contracts in relation to labor which may seem to him appropriate or necessary for the support of himself and his family?

Having thus indicated as a guide to the committee the fundamental question involved in determining whether the proposed legislation would be constitutional, it may be of further assistance if I indicate in what manner a few attempts of the exercise of this police power in the matter of regulating the hours of labor have been judged by the Supreme Judicial Court of this Commonwealth and the Supreme Court of the United States.

The statutes regulating the hours of labor of employees of the Federal, State and municipal governments and of persons employed by persons contracting with these governments upon public work have been held to constitute a class entirely distinct from the statutes regulating the hours of labor of employees of private corporations and individuals, and have been sustained by a divided court as a lawful exercise of the right of the sovereign to prescribe the conditions under which it will permit work of a public character to be done. *Atkin v. Kansas*, 191 U. S. 207, 223.

Legislation limiting the hours of labor for women and children, while its constitutionality as applied to women has been doubted in some States, has been upheld generally and in this Commonwealth as a matter of health regulation. *Commonwealth v. Hamilton Mfg. Co.*, 120 Mass. 383; *Opinion of the Justices*, 163 Mass. 589, 594; *Commonwealth v. Riley*, 210 Mass. 387.

In the case of *Holden v. Hardy*, 169 U. S. 366, the question of regulating the hours of labor for men was raised, and the Supreme Court of the United States, with two justices dissenting, sustained as a valid exercise of the police power a statute of the State of Utah entitled "An Act regulating the hours of employment in underground mines and in smelters and ore reduction works," which limited to eight hours per day the

period of employment in all underground mines and in smelters and all other institutions for the reduction or refinement of ores or metals, except in case of emergency where life or property was in imminent danger. It was pointed out in that case that the men worked in an atmosphere of poisonous gases, dust and impalpable substances which in the judgment of the court tended to produce morbid, noxious and deadly effects in the human system. In the course of its opinion the court said:—

These employments, when too long pursued, the Legislature has judged to be detrimental to the health of the employees, and, so long as there are reasonable grounds for believing that this is so, its decision upon this subject cannot be reviewed by the Federal courts.

In the case of *Lochner v. New York*, 198 U. S. 45, the United States Supreme Court, with three justices dissenting, reversed the decision of the highest court of New York, and held unconstitutional, as not within the limits of the police power, a statute of New York limiting to sixty hours in any one week the period of employment in a biscuit, bread or cake bakery or confectionery establishment, and containing no emergency clause. In this case the court referred to the above-mentioned case of *Holden v. Hardy* as one of the “border ones” in which the court had been “guided by rules of a very liberal nature.” A careful reading of the entire opinion in this case would unquestionably be instructive to the committee, but particular attention should be called to the following quotations from the opinion:—

It is a question of which of two powers or rights shall prevail—the power of the State to legislate or the right of the individual to liberty of person and freedom of contract. The mere assertion that the subject relates though but in a remote degree to the public health does not necessarily render the enactment valid. The act must have a more direct relation, as a means to an end, and the end itself must be appropriate and legitimate, before an act can be held to be valid which interferes with the general right of an individual to be free in his person and in his power to contract in relation to his own labor. — Page 57.

We think the limit of the police power has been reached and passed in this case. There is, in our judgment, no reasonable foundation for holding this to be necessary or appropriate as a health law to safeguard the public

health or the health of the individuals who are following the trade of a baker. — Page 58.

The act is not, within any fair meaning of the term, a health law, but is an illegal interference with the rights of individuals, both employers and employees, to make contracts regarding labor upon such terms as they may think best, or which they may agree upon with the other parties to such contracts. — Page 61.

Other decisions of the United States court and of the various state courts might be cited, but perhaps enough have been referred to, to show the view taken by the majority of a divided court at the time when the questions were presented.

The question of the constitutionality of the legislation proposed cannot be adequately considered or discussed except upon presentation of the facts with reference to the occupation to which the proposed legislation is to apply. It is for the Legislature, in the first instance, to say, upon the facts and considerations presented to it, whether in its judgment there is "fair and reasonable ground, in and of itself, to say that there is material danger to the public health or to the health of the employees" if the hours of labor are not curtailed in the occupations to which these bills refer.

I assume that evidence and arguments have been submitted, or will be submitted, to the committee, bearing upon the relation which exists between these various occupations and the health of those employed in them. No such evidence or arguments are before me, and I am, therefore, unable to determine finally the character of the employment in these occupations as shown by any particular evidence that has been or may be submitted to the committee.

It is to be noted, however, that Senate Bill No. 145, limiting the hours of employment of employees of express companies, purports to limit the hours of employment of "all employees" in the express business. It would thereby place a person doing light office work, with long intervals of comparative leisure, or a person merely exercising the functions of supervisor of teaming, employed in the open air, upon the same basis with a man doing heavy manual labor and one exposed to long hours out-of-doors in bad weather.

It is to be noted, also, that House Bill No. 47, limiting the hours of labor of registered pharmacists, assistant pharmacists, clerks, apprentices "or other employee" in any pharmacy, drug store or apothecary shop to sixty-five hours in any one week, applies equally to the pharmacist constantly engaged in preparing prescriptions and to the clerk whose only duty is to tend the counter at which confectionery and cigars are sold.

With reference to these bills and to House Bill No. 1081, limiting to eight hours per day the period of employment in any paper mill, foundry, factory or any manufacturing, mechanical or other industrial establishment, as therein provided, the committee will have before it sufficient information to enable it to determine the question under the principles hereinbefore set forth, applying in addition to common knowledge of the facts in reference to such business such particular evidence or facts as have been or may be submitted to the committee for the purpose of enlightening it as to the necessity for such legislation, or as indicating that there is danger to health and welfare in these various occupations, within the limits hereinbefore set forth.

CONSTITUTIONAL LAW — SALE OF FRUIT, VEGETABLES AND NUTS AT RETAIL BY DRY MEASURE — LEGAL WEIGHT.

The provision of R. L., c. 57, § 21, as amended by St. 1912, c. 246, that "all fruits, vegetables and nuts, . . . shall be sold at retail by dry measure, weight or by numerical count, and all fruits and vegetables for which a legal weight has been established shall be sold at retail only by weight or numerical count," may constitutionally be amended so as to provide that "all fruits, vegetables and nuts for which a legal weight has been established shall be sold at retail only by dry measure, weight or numerical count, but not less than the legal weight shall be given when the same are sold by dry measure."

If such proposed amendment were enacted, a purchaser buying by dry measure would be entitled to receive the established legal weight of the commodity purchased so far as a specific weight per unit of dry measure was established by law therefor, and the dealer would be required to ascertain that the weight for such commodity as measured did not fall below the weight required by law in the case of the unit of dry measure employed in such sale.

You have submitted for my consideration certain questions relating to the effect of a proposed amendment of R. L., c. 57, § 21, as amended by St. 1912, c. 246. This section is as follows: —

To the
Committee on
Mercantile
Affairs.
1913
March 5.

All fruits, vegetables and nuts, except as hereinafter otherwise provided, shall be sold at retail by dry measure, weight or by numerical count, and all fruits and vegetables for which a legal weight has been established shall be sold at retail only by weight or numerical count. Whoever violates any provision of this section shall forfeit a sum not exceeding ten dollars for each offence.

The proposed bill, if enacted, will amend the above section so as to provide that —

All fruits, vegetables and nuts for which a legal weight has been established shall be sold at retail only by dry measure, weight or numerical count, but not less than the legal weight shall be given when the same are sold by dry measure. Whoever violates any provision of this section shall forfeit a sum not exceeding ten dollars for each offence.

The effect of this amendment will be to permit sales by dry measure, provided that the commodity sold equals the weight required by law for such dry measure. See R. L., c. 62, § 3, as amended by St. 1902, c. 115; St. 1911, c. 397, § 4, as amended by St. 1910, c. 297, and St. 1912, c. 284, and § 5.

To the specific inquiries submitted by the committee, I reply as follows: —

First. — Would the proposed amendment be constitutional?

Upon the assumption that the original limitation imposed by the statute to which the proposed amendment is applicable was a reasonable and proper one under the circumstances, I am of opinion that said amendment would not be objectionable upon any constitutional ground. It goes no further than to require that if a dealer in fruits, nuts or vegetables undertakes to sell them, or any of them, by dry measure, he must see that the commodity measured does not weigh less than the weight established by law therefor.

Second. — Would the purchaser be entitled to the established legal weight of such fruit, nuts and vegetables, when the same were bought and sold by dry measure, if the proposed amendment became law?

So far as a specific weight per unit of dry measure was established by law, the purchaser would be entitled to receive it if he bought by dry measure.

Third. — If the proposed amendment became law, and if it is true that the established legal weights of certain fruits, nuts and vegetables are sometimes more than the actual weights of the same when correctly measured, will the law establishing the legal weight of such fruits, nuts and vegetables govern the sale at retail of the same?

In the case stated the weight of the commodity contained in the unit of dry measure must be equal to the established legal weight for such commodity as measured, and the dealer is required at his peril to ascertain that such weight does not fall below the weight required by law in the case of the unit of dry measure employed in the sale.

Fourth. — If the seller gave less than the legal weight, when he sold by dry measure fruits, nuts and vegetables for which a legal weight has been established, would the Commonwealth have difficulty in obtaining a conviction under the proposed amendment if it became law?

If there was sufficient evidence of such sale I see no reason why, as matter of law, there should be difficulty in obtaining a conviction.

INSURANCE COMPANY — MASSACHUSETTS EMPLOYEES INSURANCE ASSOCIATION — INDEBTEDNESS FOR OUTSTANDING LOSSES — DETERMINATION.

The Massachusetts Employees Insurance Association, incorporated under the provisions of St. 1911, c. 751, Part IV., is not subject to St. 1907, c. 576, § 11, as amended by St. 1911, cc. 54 and 315, which, in providing for the determination of indebtedness for outstanding losses, requires an arbitrary charge to be made against any corporation writing policies covering insurance against loss or damage resulting from accident to or injury suffered by an employee or other person, for which the insured is liable, and against loss from liability on account of the death of or injury to an employee not caused by the negligence of the employer, to be computed as therein provided.

You have inquired with reference to the application to the Massachusetts Employees Insurance Association of so much of St. 1907, c. 576, § 11, as amended by St. 1911, cc. 54 and 315,

To the
Insurance
Commissioner.
1913
March 7.

as provides that "the indebtedness for outstanding losses under insurance against loss or damage resulting from accident to or injuries suffered by an employee or other person, for which the insured is liable, and under insurance against loss from liability on account of the death of or injury to an employee not caused by the negligence of the employer, shall be determined" according to the method therein prescribed, which in substance requires an arbitrary charge to any corporation writing policies covering any of the kinds of insurance above described of indebtedness for outstanding losses upon such policies, to be determined as follows: —

(10) for all suits being defended under policies written more than ten years prior to the date as of which the statement is made, except suits in which liability is not dependent upon negligence of the insured, one thousand dollars for each suit; (11) for all suits being defended under policies written more than five years and less than ten years prior to the date as of which the statement is made, except suits in which liability is not dependent upon negligence of the insured, seven hundred and fifty dollars for each suit; (12) for all deaths for which the insured are liable without proof of negligence, covered by policies written more than five years prior to the date as of which the statement is made, the amount necessary to pay for such deaths; (13) for all unpaid claims on account of non-fatal injuries for which the insured are liable without proof of negligence under policies written more than five years prior to the date as of which the statement is made, the present value of the estimated future payments; (14) for the policies written in the five years immediately preceding the date as of which the statement is made an amount determined as follows: multiply the earned premiums of each of such five years as shown in item (1) by the loss ratio ascertained as in item (6) on all the policies written in the first five years of the said ten-year period, using as the divisor the sum of the earned premiums shown in item (1) for said first five years, and as the dividend the sum of the payments shown in item (2) for said first five years plus the sum of the charges in items (3), (4) and (5) for said first five years; but the ratio to be used shall in no event be less than fifty per cent at and after December thirty-first, nineteen hundred and eleven, nor less than fifty-one per cent at and after December thirty-first, nineteen hundred and twelve, nor less than fifty-two per cent at and after December thirty-first, nineteen hundred and thirteen, nor less than fifty-three per cent at and after December thirty-first, nineteen hundred and fourteen, nor less than fifty-four per cent at and after December thirty-first, nineteen hundred and fifteen, nor less than fifty-five per cent at and after

December thirty-first, nineteen hundred and sixteen; and from the amount so ascertained in each of the last five years of said ten-year period deduct all payments made under policies written in the corresponding year as shown in item (2), and the remainder in the case of each year shall be deemed the indebtedness for that year: *provided, however*, that if the remainder in the case of any year of the first three years of the five years immediately preceding the date as of which the statement is made shall be less than the sum of the three following items for that year at that date, — (a) the number of suits, except suits in which liability is not dependent upon negligence of the insured, being defended under policies written in that year, and a charge of seven hundred and fifty dollars for each suit; (b) the amount necessary to pay for all deaths for which the insured are liable without proof of negligence, covered by policies written in that year; and (c) the present value of estimated unpaid claims on account of non-fatal injuries for which the insured are liable without proof of negligence, covered by policies written in that year, — then the sum of said items (a), (b) and (c) shall be the indebtedness for that year.

The Massachusetts Employees Insurance Association is a mutual company organized under the provisions of St. 1911, c. 751, Part IV., for the purpose of insuring to employees of persons who become members of or subscribers to the corporation such compensation as is provided by the various sections of Part II. of said act.

By section 23 of Part IV. it is provided that —

The provisions of chapter five hundred and seventy-six of the acts of the year nineteen hundred and seven and of acts in amendment thereof shall apply to the association, so far as such provisions are pertinent and not in conflict with the provisions of this act, except that the corporate powers shall not expire because of failure to issue policies or make insurance.

From a consideration of the provisions of St. 1911, c. 751, which relate to the organization of the Massachusetts Employees Insurance Association and prescribe the extent of its liability and the manner in which its business is to be conducted, it appears that the company is confined to the so-called workmen's compensation insurance established by said chapter — with the unimportant exception of its liability in cases of such employees as may decline to accept the provisions thereof — and its subscribers are limited to employers "in the Commonwealth." Its

maximum liability upon any particular policy is fixed by the statute itself and claims against it are promptly heard and determined as they arise. In respect of these characteristics the company is readily to be distinguished from other companies which may engage in the business of insuring against loss or damage resulting from accident to or injuries suffered by an employee or other person for which the insured is liable, or against loss from liability on account of the death of or injury to an employee not caused by the negligence of an employer, in connection with other forms of insurance and in many States, to which companies the provisions of St. 1907, c. 576, § 11, are made applicable.

A further and more important distinction, which in my opinion is decisive of the present question, is that the directors of the Massachusetts Employees Insurance Association are required to distribute its subscribers into groups in accordance with the nature of the business and the degree of the risk of injury, and to fix all premiums, assessments and dividends by and for such groups according to the experience of each group. By section 17 of Part IV. it is provided that any proposed premium, assessment, dividend or distribution into groups shall not be effective until approved by the Insurance Commissioner. The obvious purpose of these provisions was to furnish adequate insurance to the employee at the least possible cost to the subscriber, and the division into groups was required in order that the actual cost of such insurance in any group might be readily ascertained and established and the surplus remaining in the hands of the company might be seasonably returned to those by whom it had been contributed, in the proportions fixed by the experience of the especial group in which each subscriber was enrolled. In view of this purpose, a determination of the indebtedness of the company for outstanding losses according to the provisions of St. 1907, c. 576, § 11, in its amended form, which would impose upon the company an arbitrary charge against each policy, without reference to the group in which it was placed, would not only be not pertinent to the group system but in conflict therewith.

In reply to your specific question, therefore, I have to advise you that in my opinion the Massachusetts Employees Insurance Association does not come within the provisions of St. 1907, c. 576, § 11, as amended by St. 1911, cc. 54 and 315.

BOSTON ELEVATED RAILWAY COMPANY — EAST BOSTON TUNNEL — TOLLS — SECURITY FOR BONDS OF CITY OF BOSTON — SUBSTITUTION OF ANNUAL APPROPRIATION — IMPAIRMENT OF OBLIGATION OF CONTRACT — CONSTITUTIONAL LAW.

A proposed bill providing that "the city of Boston is hereby authorized to appropriate from the tax levy each year, . . . the sum of one hundred and twenty-five thousand dollars to be added to the rental received from the Boston Elevated Railway Company for the lease of the East Boston tunnel, the sum total of which shall be used to provide for the payment of the interest and sinking fund requirements of the bonds issued for the construction of the East Boston tunnel," in so far as it requires that such appropriation shall be used for a purpose which amounts to an indirect abolition of such tolls in a manner not necessarily in accordance with the provisions of St. 1897, c. 500, § 17, that the city of Boston shall collect from each person passing through such tunnel in either direction a toll of one cent, to be used with other funds to meet the interest and sinking fund requirements of bonds issued by the city of Boston to defray the cost of constructing such tunnel unless such tolls are abolished or diminished by the Board of Railroad Commissioners in the manner and for the reasons set forth in said section, if enacted would be unconstitutional and void as impairing the obligation of the contract created by such section.

I have the honor to transmit herewith my opinion submitted in accordance with the order of the Honorable House of Representatives, as follows: —

To the House
of Representatives.
1913
March 12.

Ordered, That the Attorney-General be requested to inform the House of Representatives whether, in his opinion, the provisions of House Bill No. 1961, being An Act to authorize the city of Boston to assume the payment of the tolls for the use of the East Boston tunnel, a copy of which is sent herewith, would, if enacted, violate any provision of the Constitution of the United States or of the Constitution of the Commonwealth.

House Bill No. 1961, referred to in said order, is entitled "An Act to authorize the city of Boston to assume the payment of the tolls for the use of the East Boston tunnel," and provides as follows: —

SECTION 1. The city of Boston is hereby authorized to appropriate from the tax levy each year, until the tenth day of June, nineteen hundred and twenty-two, the sum of one hundred and twenty-five thousand dollars to be added to the rental received from the Boston Elevated Railway Company for the lease of the East Boston tunnel, the sum total of which shall be used to provide for the payment of the interest and sinking fund requirements of the bonds issued for the construction of the East Boston tunnel. Said appropriation may be initiated by either the mayor or city council.

SECTION 2. This act shall take effect upon its passage.

While the inquiry of the Honorable House of Representatives is very broad in its terms, I assume that it is directed toward the effect of such bill, if enacted, upon the provisions of St. 1897, c. 500, § 17, of which the material part is as follows:—

. . . Said city shall collect from each person passing through said tunnel in either direction a toll of one cent: *provided, however*, that if in any year ending on the thirtieth day of September the receipts from such tolls, together with the rental above provided for, amount to a sum so in excess of the interest and sinking fund requirements of said bonds for that year that the board of railroad commissioners is of opinion that the toll may be reduced, said board shall on petition of ten citizens of said city establish such reduced toll for the period of one year from the first day of January next ensuing, as will in its opinion yield an amount sufficient to meet, with said rental, said interest and sinking fund requirements for that year; or said board may altogether discontinue such toll when it is of opinion that such rental alone is sufficient to meet said requirements; but any such reduction shall be carried into effect by a provision for the sale of tickets, and the cash fare shall continue to be one cent. The whole amount of such tolls and of said rentals is hereby pledged to meet the principal and interest of the bonds issued to pay for the construction of said tunnel or tunnels, and this pledge shall be expressed on the face of such bonds as one of the terms thereof; *provided, however*, that after such tolls have been discontinued if said rentals shall for any year ending on the thirtieth day of September yield an amount more than sufficient to meet the interest and sinking fund requirements of said bonds for such year such excess over said requirements shall be regarded as general revenue of said city. In case in any year the rentals and tolls above-provided for shall not yield a sufficient amount to meet said interest and sinking fund requirements the compensation received by said city under section ten of this act shall be applied so far as may be necessary toward meeting such requirements. Said corporation shall be the agent of said city to collect such tolls under such arrangements as shall be agreed upon by said city and said corporation, or in case

of disagreement, as shall be determined by the board of railroad commissioners.

In discussing an amendment to this section which abolished such tolls and instead required the city of Boston to set aside from the compensation received by it from the Boston Elevated Railway Company under section 10 of the same chapter a toll of one cent for each person passing through said tunnel in either direction, the then Attorney-General, in an opinion to the Committee on Metropolitan Affairs (II. Op. Atty.-Gen. 505), said:—

It is to be observed that the pledge above referred to is obviously designed to afford security for the full and timely payment of the principal and interest of the bonds issued to pay for the work of constructing the tunnel, by specifically devoting a certain income to that purpose. If the income as assigned exceeds the amount necessary, the surplus may be treated as the general revenue of the city of Boston. If, on the other hand, the specified sources are not sufficient to provide the necessary sum, a third source of income is made available, namely, the income received by the city as compensation for the use of the public streets, ways and places, under the provisions of section 10. If, after experiment, it appears to the Board of Railroad Commissioners that the tolls and rental exceed the amount required for principal and interest of the bonds issued by the city, they may reduce the toll by making provision for the sale of tickets, though cash fares must still be paid in the same amount by passengers; and if the rental alone becomes sufficient for the specified purposes, the tolls may be discontinued.

House Bill No. 1192 in effect abolishes one source of income, viz., the tolls, and provides that the amount which would have been furnished to the city from such tolls shall be payable out of the compensation received by the city under section 10. This may or may not diminish or materially affect the sources of income available as security for the bonds issued, since the amount received as compensation under section 10 by the city may or may not be sufficient to provide for all deficits which may exist from year to year in the rental, the significant effect of the provision being to abolish the tolls entirely. This, in my judgment, constitutes a material interference with and impairment of the obligation of contract between the city and the bondholders, created by section 17. If the effect of the proposed legislation were merely to substitute one security for another of equal value, it would be, if compulsory, objectionable on constitutional grounds; if the compulsory substitution be to provide a security of less

value than the original, or one of a lower grade, it certainly conflicts with constitutional requirements.

Again, in discussing the question whether or not it is within the constitutional power of the Legislature to abolish the tolls provided for in said section, the Supreme Judicial Court, in an opinion to the Honorable Senate and House of Representatives (Opinion of the Justices, 190 Mass. 605, 608), said: —

Section 10 of Article I. of the Constitution of the United States contains this provision: "No state shall . . . pass any . . . *ex post facto* law, or law impairing the obligation of contracts, or grant any title of nobility," etc. Upon each of the bonds referred to, issued by the city of Boston in accordance with the provisions of the St. of 1897, c. 500, are stamped the following words: "East Boston Tunnel. The whole amount of the rentals for the use of and tolls for persons passing through the East Boston tunnel is pledged for the payment of the principal and interest of this loan." This statement, which was thus made a part of the contract on the faith of which purchasers have bought the bonds, was authorized and required by the statute. The fact that lies behind the statement, namely, that the rentals and tolls are actually set apart and pledged as security for this payment, is also a requirement of the statute. We have, therefore, a contract which rests not only upon the agreement of the city, made for a valuable consideration, but upon the deliberate action and solemnly pledged faith of the Commonwealth. The tolls referred to are the tolls then established by law and they cannot be diminished without reducing the security to which the owners of the bonds are entitled. It is plain that the sale of bonds, carrying on their face this stipulation, creates a contract with each purchaser which it is not in the power of the Legislature to impair.

It appears to be well established, therefore, that any legislation which affects or impairs the security afforded by the collection of the tolls as above required to the holders of bonds to meet the principal and interest for which such tolls are pledged would clearly be unconstitutional; and this would be true notwithstanding the fact that some other form of security was substituted therefor. *Seibert v. Lewis*, 122 U. S. 284, 290; *Nelson v. St. Martin's Parish*, 111 U. S. 716; *Louisiana v. Pillsbury*, 105 U. S. 278, 287, 288.

So far as the proposed bill purports to substitute for the se-

curity afforded by the collection of the tolls from persons passing through the East Boston tunnel another and different form of security to be paid by the city of Boston from its general revenue as raised by taxation, and to abolish such tolls, it would, in my opinion, be unconstitutional as impairing the obligation of the contract. While the bill is entitled "An Act to authorize the city of Boston to assume the payment of the tolls for the use of the East Boston tunnel," the bill itself does not in terms confer any such authorization. The first part goes no further than to permit the city of Boston to appropriate annually the sum mentioned therein, "to be added to the rental received from the Boston Elevated Railway Company for the lease of the East Boston tunnel." It does not abolish the tolls themselves nor affect them except only and in so far as they may be reduced or discontinued by the Board of Railroad Commissioners, under the provisions of the section quoted, upon the basis of a rental which includes the amount actually paid in by the Boston Elevated Railway Company, amounting to three-eighths of one per cent. of the gross receipts for each year ending September 30 of all lines owned, leased or operated by it, plus the amount appropriated by the city of Boston under the provisions of the proposed bill, if added thereto.

Whether or not such appropriation may be properly added to the actual rental as a basis for a reduction or discontinuance of the tolls, it is not necessary to decide; for, if such appropriation may not legally be added to or considered a part of the rental for such purpose, the tolls will not in any wise be affected by the enactment of the first portion of the proposed bill.

As to the second portion of the bill, providing "the sum total of which shall be used to provide for the payment of the interest and sinking fund requirements of the bonds issued for the construction of the East Boston tunnel," there seems to be constitutional objection in that it requires that the appropriation provided by said act "shall be used" in such a way as to amount to an indirect abolition of the tolls in a manner not necessarily in accordance with the provision of the original statute hereinbefore quoted (St. 1897, c. 500, § 17).

INSURANCE — LIFE AND DISABILITY INSURANCE — SEPARATE
AND DISTINCT POLICIES — BENEFITS CONDITIONED UPON
DISABILITY — WAIVER OF PREMIUMS — SPECIAL SUR-
RENDER VALUES.

Under the provisions of St. 1907, c. 576, § 34, as amended by St. 1912, c. 524, § 1, that "contracts of insurance for each of the classes specified in section thirty-two shall be in separate and distinct policies . . . except that . . . any foreign life insurance company authorized to transact business in this commonwealth . . . may incorporate in its policies of insurance provisions for the waiver of premiums or for the granting of special surrender values therefor in the event that the insured thereunder shall from any cause become totally and permanently disabled, . . ." a foreign life insurance company authorized to do business in this Commonwealth may incorporate in its policies a provision that in case the insured becomes wholly disabled by bodily injury or disease so as to be permanently and continuously prevented from engaging in any occupation for remuneration or profit after he has attained the age of sixty years, the company "shall waive payment of each premium thereafter becoming due during such disability, but the face amount of the policy shall be reduced by the amount of each such waived premium, . . ." the deduction so made being the amount of the premium on insurance not presently payable of which the value is at all times less than the amount of the premium in cash, and to the extent of such difference constituting a voluntary relinquishment of premium upon the part of such company.

To the
Insurance
Commissioner.
1913
March 12.
—

By a letter dated February 10 you have submitted for my consideration certain questions relative to a form of policy presented for your approval by the New York Life Insurance Company.

By St. 1907, c. 576, § 34, it was provided that "contracts of insurance for each of the classes specified in section thirty-two shall be in separate and distinct policies notwithstanding any provision of this act which permits a company to transact more than one of said classes of insurance," and this provision, in *Ætna Life Insurance Co. v. Hardison*, 199 Mass. 180, was held to forbid the offer in a policy of life insurance of any special or peculiar benefit in case of impairment of the health of the insured by bodily injury or disease, such as to prevent the insured for the rest of his life from pursuing any gainful occupation.

By section 1 of chapter 524 of the Acts of 1912, entitled "An Act relative to lapse and surrender values in policies of insur-

ance," the section above quoted was amended so as to read as follows: —

Contracts of insurance for each of the classes specified in section thirty-two shall be in separate and distinct policies notwithstanding any provision of this act which permits a company to transact more than one of said classes of insurance; except that any domestic life insurance company, notwithstanding any limitations of its charter to the contrary, and any foreign life insurance company authorized to transact business in this commonwealth, if it is permitted so to do by its charter or by the state in which it is incorporated, whether or not it has a capital stock, may incorporate in its policies of insurance provisions for the waiver of premiums or for the granting of special surrender values therefor in the event that the insured thereunder shall from any cause become totally and permanently disabled, which provisions shall state the special benefits to be granted thereunder and the cost of such concessions to the insured, and shall define in such policies what shall constitute total and permanent disability.

Under authority of the amended section the New York Life Insurance Company has submitted for approval a policy which, under the title "A. Waiver of Premiums," provides as follows: —

If, after this policy shall have been in force one full year, and before default in the payment of any premium, the company receives due proof that the insured before attaining the age of sixty years has become wholly disabled by bodily injury or disease so that he is and will be presumably, thereby permanently and continuously prevented from engaging in any occupation whatsoever for remuneration or profit, the company shall waive payment of each premium as it thereafter becomes due during the insured's said disability. In making any settlement under this policy the company shall not deduct any part of the premiums so waived, and the loan and cash surrender values provided for under section 2 shall increase from year to year in the same manner as if the premiums so waived had been paid in cash. Under all the conditions aforesaid, except that the insured shall have attained the age of sixty years before becoming disabled, the Company shall waive payment of each premium thereafter becoming due during such disability, but the face amount of the policy shall be reduced by the amount of each such waived premium, and the loan and cash surrender values as provided for under section 2 shall be based upon said reduced amount of insurance in the same manner as if the premiums for such reduced amount of insurance had been duly paid.

Upon so much of the paragraph above quoted as provides that in case the insured becomes wholly disabled by bodily injury or disease so as to be prevented permanently and continuously from engaging in any occupation for remuneration or profit after he has attained the age of sixty years, "the Company shall waive payment of each premium thereafter becoming due during such disability, but the face amount of the policy shall be reduced by the amount of each such waived premium," you require my opinion as to whether or not "it is actually a waiver of a premium when the company immediately reduces the amount of the insurance by the so-called waived premium," and, also, "whether the statute permits a change in the policy by a reduction from the amount of insurance upon the happening of the contingency in question, viz., total and permanent disability."

In my opinion, the amendment effected by St. 1912, c. 524, § 1, was not intended to permit any general combination of life and disability insurance in a single policy, but was limited to and included within its terms only benefits conditioned upon disability conferred by waiver of premiums or by special surrender values.

It is well settled that a waiver is an intentional relinquishment of a known right (*Shaw v. Spencer*, 100 Mass. 382, 395; *Worcester v. Platt*, 128 Mass. 367, 372; *United Firemen's Insurance Co. v. Thomas*, 82 Fed. Rep., 406, 408); and the waiver of a premium, to fall within the terms of the statute, must be a voluntary relinquishment of such premium either in whole or in part. If the effect of the provision in the policy now before me were merely to relieve the insured from the burden of paying his annual premium and to charge the full amount thereof against him, by making a corresponding reduction in the obligation of the company as set forth in the policy contract, the transaction might well be held to fall short of a waiver of premium, since the company would still be receiving from another source the full amount of the premium and so would relinquish nothing. It is to be observed, however, that the deduction from the face of the policy is not a deduction of the amount of the premium in money but in insurance not presently payable, the

value of which is at all times less than the amount of the premium; and to the extent of such difference, therefore, there is a voluntary relinquishment of premium upon the part of the company, or, in other words, a partial waiver of premium which in my opinion satisfies the requirements of St. 1907, c. 576, § 34, as amended by St. 1912, c. 524, § 1.

With respect to the reduction of the face of the policy, I am further of opinion that said amendment does not, in the precise terms of your second inquiry and as an independent proposition, "permit a change in the policy by a reduction from the amount of insurance upon the happening of the contingency in question, viz., total and permanent disability." In the particular case under consideration, however, such reduction must be taken in connection with the partial waiver of premium and, in my opinion, may fairly be said to be incidental thereto (see *Metropolitan Life Insurance Co. v. Insurance Commissioner*, 208 Mass. 386), and, therefore, permitted by the statute.

CONSTITUTIONAL LAW — LEGISLATURE — DELEGATION OF
LEGISLATIVE POWER — ACT CREATING JUDICIAL DISTRICT
— SUBMISSION TO VOTERS OF DISTRICT — RIGHT TO
REQUIRE OPINION OF JUSTICES OF SUPREME JUDICIAL
COURT — IMPORTANT QUESTION OF LAW.

The Legislature may constitutionally enact a statute providing that the county of Nantucket shall constitute a judicial district, under the jurisdiction of a court to be called the district court of Nantucket and that the act "shall be submitted to the voters of the county of Nantucket at the annual state election in the current year, and if accepted by a majority of the voters voting thereon it shall take effect immediately so far as the appointment and qualifying of the justices of the court are concerned, and for the remainder of the act it shall take effect on the first day of January in the year nineteen hundred and fourteen."

It is doubtful if an inquiry as to the power of the Legislature to enact a statute which shall take effect upon acceptance by a majority of the voters in such district voting thereon presents such an important question of law as would authorize a request for an opinion of the justices of the Supreme Judicial Court.

In response to your inquiry as to whether or not section 5 of House Bill No. 2159, now pending, a copy of which you enclose, is constitutional, and also "whether or not the constitutionality of said section is so doubtful as to require in your

To the House
Committee on
Bills in the
Third Reading.
1913
March 29.

judgment an opinion of the justices of the Supreme Judicial Court before the bill containing that section shall be enacted into law," I have the honor to submit herewith my opinion.

The bill to which your question refers is entitled "An Act to establish the district court of Nantucket," and provides in section 1 that —

The county of Nantucket shall constitute a judicial district, under the jurisdiction of a court to be called the District Court of Nantucket.

Section 5 is as follows: —

This act shall be submitted to the voters of the county of Nantucket at the annual state election in the current year, and if accepted by a majority of the voters voting thereon it shall take effect immediately so far as the appointment and qualifying of the justices of the court are concerned, and for the remainder of the act it shall take effect on the first day of January in the year nineteen hundred and fourteen.

The precise nature of the constitutional question upon which the committee desires to be advised is not stated, but I assume that it relates to the power of the Legislature to make the act effective upon acceptance by a majority of the voters of the county of Nantucket.

The right of the Legislature to delegate some of its legislative functions to agencies of the State or to municipalities is well established. Thus, it may delegate to State or local administrative boards or officers the working out of details under a legislative act (*Commonwealth v. Sisson*, 189 Mass. 247, 252; *Nelson v. State Board of Health*, 186 Mass. 330; *Sprague v. Dorr*, 185 Mass. 10), and this extends to authority given to State or local boards or officers to make rules and regulations which are punishable like breaches of the peace (*Brodvine v. Revere*, 182 Mass. 598), subject to the condition that such rules and regulations shall not change a general law effective throughout the Commonwealth. See *Wyeth v. Cambridge Board of Health*, 200 Mass. 474, 481.

With respect to the delegation of legislative powers to be exercised in accepting legislation passed by the General Court and

to become effective upon acceptance, it is well settled that, while the power to accept a general law by a vote of all the people may not be delegated, laws relating to cities and towns which are local in their nature, so that they may be differently dealt with in different places, may be made to take effect upon acceptance by the voters in the municipalities to which they are applicable. Opinion of the Justices, 160 Mass. 587. Thus, it is stated in *Brodhine v. Revere, supra*, p. 600, that there is a well-known exception to the rule that the Legislature may not delegate the general power to make laws, "namely, the existence of town or other local governmental organizations which have always been accustomed to exercise self-government in regard to local police regulations and other matters affecting peculiarly the interests of their own inhabitants. On this account the determination of matters of this kind has been held to be a proper exercise of local self-government which the Legislature may commit to a city or town." And the court cites *Commonwealth v. Bennett*, 108 Mass. 27; *Stone v. Charlestown*, 114 Mass. 214; and the Opinion of the Justices, 160 Mass. 586, 589.

The only question presented by your inquiry, therefore, is whether or not the rule so established extends to and includes the establishment of a judicial district by the acceptance by the people thereof of the act constituting it.

I can see no reasonable distinction in principle between the acceptance by the voters of a city or town of a statute which deals with the local affairs of that city or town and the acceptance by the voters of any other governmental subdivision of a question which deals with its local affairs, whether it be a county, a water or fire district or a judicial district. Thus, it has been held that a provision in a statute relating to the incorporation of irrigation districts that the question whether any proposed district shall be organized thereunder may be determined by vote of the citizens of such district is not a delegation of legislative power. *Fallbrook Irrigation District v. Bradley*, 164 U. S. 112. So, also, of the approval of an act changing the boundaries of two adjoining counties by a two-thirds vote of the voters in the territory affected. *Jackson v. State*, 131 Ala. 21.

See, as to counties, *People v. Saline*, 176 Ill. 165; *Ex parte Burnside*, 86 Ky. 423; *Black v. Commissioners of Buncombe County*, 129 N. C. 121; *Ems v. Hudson*, 36 Mont. 135.

The fact that the governmental unit to be constituted is a judicial district does not, in my opinion, affect the question adversely. The constitutional provision that "the general court shall forever have full power and authority to erect and constitute judicatories and courts of record, or other courts . . ." (Part the Second, c. 1, § 1, Art. III.) may be exercised in the same manner as its authority "from time to time to make, ordain, and establish, all manner of wholesome and reasonable orders, laws, statutes, and ordinances, directions and instructions, . . . as they shall judge to be for the good and welfare of this commonwealth" (Art. IV.). See *Russell v. Howe*, 12 Gray, 147. While it is true that in practice the acceptance of statutes by popular vote has generally been limited to acts relating to matters of local regulation affecting peculiarly the interests of the inhabitants of cities and towns, such practice does not affect the principle. There is no reason why the same authority may not be conferred upon local governmental organizations other than cities and towns. See language in *Brodline v. Revere*, *supra*, p. 600. In *Rutter v. Sullivan*, 25 W. Va. 427, it was held that an act constituting a municipal court for the city of Huntington, which provided that it should be submitted to the voters of said city, and, if accepted by a majority of them, should be effectual, and if not so accepted, should be of no effect, was constitutional; and I see no reason why the same result should not be reached where the question is submitted to the voters of a county instead of a city or town.

With respect to your second question it may be doubted whether this is the kind of inquiry upon which the court is required to express an opinion. See Opinion of the Justices, 211 Mass. 630; 208 Mass. 614; 150 Mass. 598; 148 Mass. 623; and 122 Mass. 600. But whether or not it is to be treated as such an important question of law, I do not think that it may properly be said to be so doubtful as to require such an opinion.

STREET RAILWAYS — AUTHORITY TO BECOME COMMON CARRIERS OF EXPRESS MATTER AND FREIGHT — REGULATIONS AND RESTRICTIONS — BOARD OF RAILROAD COMMISSIONERS — APPROVAL.

Where, under the provisions of St. 1907, c. 402, § 1, that a street railway company may become a common carrier of newspapers, baggage, express matter and freight in such cases, upon such parts of its railway, and to such extent, in any city or town, as the board of aldermen or the selectmen in such city or town and the Board of Railroad Commissioners shall by order approve, and that if the board of aldermen or selectmen act adversely upon the petition of the company or fail to act within sixty days from the date of the filing thereof, the petitioner or interested party may present a petition to the Board of Railroad Commissioners, who, if public necessity and convenience require the granting of such petition, shall make an order requiring any street railway company named in such petition to act as such common carrier in such cases, upon such parts of its railway and to such extent and under such regulations and restrictions as in the opinion of said railroad commissioners public necessity and convenience require, the board of selectmen of a town had authorized a street railway to become a common carrier of newspapers, baggage, express matter and freight, and thereafter, before any action was taken by the street railway company to obtain the approval of the Board of Railroad Commissioners, duly revoked its order, such revocation does not constitute adverse action upon the petition which would authorize the Board of Railroad Commissioners to receive and act upon such petition. If, however, no further action was taken within sixty days of the date of the filing of the petition, the selectmen have failed to act within the meaning of the provision above cited, and the Board of Railroad Commissioners would be authorized to entertain a petition by the street railway company or any other interested party, and, after public notice and a hearing, to determine whether or not public necessity and convenience required the granting thereof.

Where a board of selectmen, in an order approving of a street railway becoming a common carrier of newspapers, baggage, express matter and freight under the provisions of St. 1907, c. 402, includes therein illegal limitations or conditions, the Board of Railroad Commissioners may disregard such illegal limitations and conditions and may approve such matters contained in the order as the board of selectmen was authorized to include therein.

You have submitted for my consideration certain general inquiries relative to the application of the provisions of St. 1907, c. 402, § 1. This section is as follows: —

To the Board
of Railroad
Commissioners.
1913
April 14.

A street railway company may become a common carrier of newspapers, baggage, express matter and freight in such cases, upon such parts of its railway, and to such extent, in any city or town, as, after public notice and a hearing, upon the petition of any interested party, the board of aldermen or the selectmen in such city or town and the board of railroad

commissioners shall by order approve. If the board of aldermen or selectmen to whom such a petition is presented act adversely thereon or fail to act within sixty days from the date of the filing of such petition the petitioner or any interested party may file such petition with the board of railroad commissioners, who shall after public notice and a hearing determine whether public necessity and convenience require the granting of such petition and shall make an order dismissing such petition or requiring any street railway company named in such petition to act as such common carrier in such cases, upon such parts of its railway and to such extent, and under such regulations and restrictions, as in the opinion of said railroad commissioners public necessity and convenience require. Any street railway company acting under authority hereof shall be subject to such regulations and restrictions as may from time to time be made by the local authorities aforesaid, with the approval of the railroad commissioners, and shall also be subject to the provisions of all laws now or hereafter in force relating to common carriers so far as they shall be consistent herewith and with said regulations and restrictions. The authority conferred upon any street railway company by virtue of the provisions of this act may at any time be revoked or terminated in any city or town or upon any part of its railway, by the board of aldermen or selectmen with the approval of the board of railroad commissioners.

You inquire: —

(1) Assuming that the board of selectmen have by an order after notice and hearing authorized a street railway company to become a common carrier of newspapers, baggage, express matter and freight in accordance with the provisions of chapter 402 of the Acts of 1907, and that before any action is taken by the street railway company to obtain approval of the Board of Railroad Commissioners the board of selectmen revokes its order. Does this constitute an adverse action by the board of selectmen which authorizes the Board of Railroad Commissioners to act upon a petition of the street railway company to become a common carrier if public necessity and convenience require the granting of such petition in accordance with the provisions of said chapter?

Upon the assumption above stated, that the order of approval made by the selectmen was duly revoked by them, I am of opinion that such revocation is not to be regarded as adverse action upon the petition before them, but that if thereafter no further action was taken within sixty days of the date of the filing of said petition, the selectmen have failed to act within

the meaning of the statute and the Board of Railroad Commissioners would be authorized to entertain a petition by the street railway company or any other interested party, and, after public notice and a hearing, to determine whether or not public necessity and convenience require the granting of such petition.

(2) Assuming that a board of selectmen in an order approving of a street railway company becoming a common carrier of newspapers, baggage, express matter and freight under the provisions of chapter 402 of the Acts of 1907 include in that order certain provisions which the Board of Railroad Commissioners deems improper or illegal, such as a twenty-year limitation or requiring the street railway company to light the streets of the town, can the Board of Railroad Commissioners approve of said order eliminating in its order such provisions as it deems improper or illegal?

I am of opinion that the statute above quoted does not authorize the selectmen of a town, in making an order approving the carrying on by a street railway company of the business of a common carrier of newspapers, baggage, express matter and freight, to impose a limitation upon the duration of the franchise or conditions requiring the lighting of the streets or other similar services. The procedure of the Board, however, with respect to an order containing such provisions which is presented for approval, raises a more difficult question. It might well be argued that, since the approval of the selectmen is conditioned upon limitations and requirements which are illegal and, therefore, of no binding force and effect, the order as a whole should be treated as a nullity, and the moving party should be required to petition the Board to make an order in the premises upon the ground that the selectmen had failed to act within the required period of time. Upon the other hand, it has been held that the acceptance of a grant of location by a street railway company does not make valid conditions which the selectmen could not legally impose. *Keeffe v. Lexington & Boston Street Railway Co.*, 184 Mass. 183, 185. And the invalidity of such conditions does not render invalid the grant of the location. See *Keeffe v. Lexington & Boston Street Railway Co.*, *supra*; *Selectmen of Wellesley v. Boston & Worcester Street*

Railway, 188 Mass. 250. In the case suggested by your inquiry, therefore, there would seem to be authority for the conclusion that the imposition of illegal limitations or conditions would not render void so much of the order of the selectmen as purported to approve the operation of the street railway company as a common carrier, the cases in which, the parts of its railway upon which, and the extent to which it should so act. This in my opinion is the better view, and it would follow that the Board of Railroad Commissioners would be authorized to approve such of the matters contained in said order as the selectmen might legally include therein.

FLATS — CULTIVATION OF FOOD AND BAIT MOLLUSKS — GRANT FROM THE COMMONWEALTH TO PRIVATE INDIVIDUALS OF RIGHT TO CONTROL AREA BETWEEN HIGH AND LOW WATER MARK — EMINENT DOMAIN — CONSTITUTIONAL LAW.

A proposed bill to authorize the Commissioners on Fisheries and Game, acting in behalf of the Commonwealth, to grant a license for not more than fifteen years to any inhabitant of the Commonwealth to plant, grow and dig mollusks or to plant shells for the purpose of catching mollusk seed, upon and in any territory below mean high water mark, which contemplates not only the granting of the exclusive right to take shellfish for such period and to plant and grow mollusks and to plant shells for the purpose of catching mollusk seed upon the area defined in such license, but also the entire exclusion of the owner, where such flats are subject to private ownership, from any use or occupation of such flats by inclosure or filling, cannot be justified as the imposition, under the police power, of a reasonable regulation, limitation or restraint in the use and enjoyment of property to prevent the same from being injurious to others, and constitutes so material an interference with existing rights of property in such areas as to amount to an exercise of the power of eminent domain without due provision for compensating the owner of the property taken; and such bill, if enacted, would be unconstitutional and void.

You have submitted to me the following inquiry: —

May the Commonwealth constitutionally provide for leasing to private individuals the right to control the area between high and low water marks upon tidal flats, as provided in sections 2 and 5 of the proposed act relating to the cultivation of food and bait mollusks, which is submitted herewith?

To the House
Committee on
Fisheries and
Game.
1913
May 1.

The sections to which you refer are as follows:—

SECTION 2. The commissioners on fisheries and game may, by writing under their hands, grant a license, for a term not exceeding fifteen years, to any inhabitant of the commonwealth to plant, grow and dig mollusks at all times of the year or to plant shells for the purpose of catching mollusk seed, upon and in any territory, as hereinafter specified and described, below mean high water mark, upon such terms and conditions as they may deem proper, not, however, materially obstructing navigable waters.

SECTION 5. The available territory for the growth and planting of mollusks shall be divided into two classes; the shallow waters near shore, including the flats, creeks, inlets and bays, which shall be allotted to the smaller planters; and the deep or more exposed waters, which shall be leased to individual planters, partnerships or corporations, who shall give suitable guarantee of sufficient capital to develop the same. Due regard for the public fisheries shall be given by the commissioners on fisheries and game in granting these licenses.

The question of the committee requires my opinion upon the constitutionality of the provision for the granting by the Commonwealth of licenses to individuals, for a fixed term of years, to cultivate mollusks upon flats below mean high water mark and above extreme low water mark.

By the colony ordinance of 1641-47 it was provided that every inhabitant who was a householder should have free fishing and fowling in any great ponds and bays, coves and rivers so far as the sea ebbs and flows, within the precincts of the town in which he lived, unless the town had otherwise appropriated them, and that in all creeks, coves and other places upon tide-waters the proprietors of the upland adjoining should have property to the low water mark where the sea does not ebb above one hundred rods and no more whatsoever it ebbs, and, further, that such proprietors should not have power to stop or hinder the passage of boats or other vessels to any other man's houses or lands. See *Commonwealth v. Roxbury*, 9 Gray 451 (note).

The effect of the colony ordinance is stated in *Commonwealth v. Alger*, 7 Cush. 53, 79, to be —

That it vested the property of the flats in the owner of the upland in fee, in the nature of a grant; but that it was to be held subject to a general

right of the public for navigation until built upon or inclosed, and subject also to the reservation that it should not be built upon or inclosed in such manner as to impede the public right of way over it for boats and vessels.

Again, in *Henry v. Newburyport*, 149 Mass. 582, 585, in speaking of the colony ordinance, the court said: —

This secured to such proprietor, not merely an easement, but a property in the land in fee, with full power to reclaim the flats by building wharves, or inclosing them, so as to exclude navigation, provided he did not cut off his neighbors' access to their houses or lands. He could erect wharves or other structures thereon, could fill up the same, and plant stakes thereon, even to the obstruction of the public right of fishing.

The proprietor of the upland, therefore, has a right of property in the adjacent flats between high and low water mark, or between high water mark and a point one hundred rods distant therefrom where the sea ebbs more than one hundred rods, of which he may be deprived only by the exercise of the power of eminent domain. See *Boston & Roxbury Mill Corporation v. Newman*, 12 Pick. 467; *Ashby v. Eastern Railroad Co.*, 5 Met. 368; *Drury v. Midland Railroad*, 127 Mass. 571. Subject to the provisions of R. L., c. 96, § 17 (1 Op. Atty.-Gen. 412), he may exclude navigation from his own flats by building wharves or other structures down to extreme low water mark, or for one hundred rods, as the case may be, if not prohibited by legislation from so doing, and if the structures so erected do not materially impede the general navigation of the tidewaters of the bay, cove or river upon which they are situated, or cut off access to neighboring houses or lands (*Keene v. Stetson*, 5 Pick. 492, 495; *Davidson v. Boston & Maine Railroad*, 3 Cush. 91, 105; *Boston v. Richardson*, 105 Mass. 351, 359), or interfere with the public right of fishing thereon by planting stakes. *Locke v. Motley*, 2 Gray, 265. As was stated by the court in *Butler v. Attorney-General*, 195 Mass. 79, 83 —

Except as against public rights, which are protected for the benefit of the people, the private ownership is made perfect.

And these public rights of fishing, fowling and boating may be exercised only so long as the flats are unused and uninclosed.

See *Commonwealth v. Alger*, 7 Cush. 53, 79; *Weston v. Sampson*, 8 Cush. 347, 354; *Lakeman v. Burnham*, 7 Gray, 437, 441.

The bill submitted purports to authorize the Commissioners on Fisheries and Game, acting in behalf of the Commonwealth, to grant a license for not more than fifteen years to any inhabitant of the Commonwealth to plant, grow and dig mollusks or to plant shells for the purpose of catching mollusk seed upon and in any territory below mean high water mark. For the purposes specified the existing public right would permit no more than an entrance upon the flats for the taking of shellfish. See *Packard v. Ryder*, 144 Mass. 440, and cases cited. The proposed license, however, contemplates not only the granting of an exclusive right to take shellfish for a period not exceeding fifteen years and to plant and grow mollusks and to plant shells for the purpose of catching mollusk seed upon the area defined in such license but, also, by implication, the entire exclusion of the owner from any use or occupation thereof by inclosure or filling. See sections 14 and 17.

The exercise of the authority so established cannot, in my opinion, be justified as the imposition, under the police power, of a "reasonable regulation, limitation or restraint in the use and enjoyment of property which shall prevent the same from being injurious to others," such as the establishment of harbor lines, as sustained in *Commonwealth v. Alger*, 7 Cush. 53, 85, or the prohibition of the removal of sand or gravel from beaches, as sustained in *Commonwealth v. Tewksbury*, 11 Met. 55, nor can it be regarded as merely a reasonable or proper regulation of or limitation upon the public right of fishing, such as was sustained in *Commonwealth v. Vincent*, 108 Mass. 441, and *Commonwealth v. Weatherhead*, 110 Mass. 175 (see, also, *Wattuppa Reservoir Co. v. Fall River*, 147 Mass. 548, 557); for, in addition to the regulation of the public right, the owner of the fee in any flats between mean high water mark and extreme low water mark is deprived of all use and enjoyment thereof for the duration of any license or licenses in which from time to time such flats may be included. This constitutes so material an interference with existing rights of property in such areas as

to require me to hold that the bill in effect authorizes an exercise of the power of eminent domain without making due provision for compensating the owner of the property taken, and that, so far as its provisions purport to confer upon the Commissioners on Fisheries and Game authority to lease any area between high and low water mark which is the subject of private ownership, they will, if enacted, be unconstitutional and void.

REGISTER OF DEEDS — FEE — MINIMUM CHARGE FOR RECORDING DEEDS, MORTGAGES AND OTHER INSTRUMENTS.

The provision contained in St. 1912, c. 502, § 25, entitled "An Act to shorten the forms of deeds, mortgages and other instruments relating to real property," that "fees for recording instruments drawn in accordance with the provisions of this act shall be the same as those now required by law, but in no case shall the charge for recording a deed or conveyance be less than sixty-five cents, and in no case shall the charge for recording a mortgage be less than one dollar and twenty-five cents," establishes a minimum fee which is applicable to all deeds and mortgages whether or not they conform to the provisions of St. 1912, c. 502.

To the
Controller of
County
Accounts.
1913
May 1.

Section 25 of chapter 502 of the Acts of 1912, entitled "An Act to shorten the forms of deeds, mortgages and other instruments relating to real property," provides as follows:—

Fees for recording instruments drawn in accordance with the provisions of this act shall be the same as those now required by law, but in no case shall the charge for recording a deed or conveyance be less than sixty-five cents, and in no case shall the charge for recording a mortgage be less than one dollar and twenty-five cents.

You inquire "whether the minimum charge established by this section relates only to instruments 'drawn in accordance with the provisions of this act' or applies to all instruments whether drawn in accordance with this act or otherwise."

The fees for recording instruments, now required by law, are established by R. L., c. 204, § 29, which as amended by St. 1908, c. 365, and St. 1910, c. 273, provides:—

The fees of registers of deeds shall be as follows:—

For entering and recording a deed or other paper, certifying the same

on the original, and indexing it, and for all other duties pertaining thereto, twenty-five cents. If it contains more than one page, at the rate of twenty cents for each page after the first: *provided, however*, that if the deed or other paper contains the names of more than two parties thereto, other than the husband or wife of the grantor or grantee, an additional fee of ten cents each shall be charged for indexing the names of additional grantors or grantees or other parties thereto. The fees shall be paid when the instrument is left for record.

For all copies, at the rate of twenty cents a page.

For entering in the margin a discharge of a mortgage, twenty-five cents.

For entering a discharge of an attachment or of a lien on buildings and land, if such discharge is certified by them, twenty-five cents.

For entering a partial release of an attachment, twenty-five cents.

The language of section 25 warrants a conclusion that the Legislature intended to establish minimum recording charges for deeds and mortgages which should be uniform in application, and in my opinion the provision to which your inquiry is directed should be construed to apply to all deeds and mortgages, whether or not they conform to the provisions of St. 1912, c. 502.

CONSTITUTIONAL LAW — APPOINTMENT OF EXECUTIVE OR ADMINISTRATIVE BOARD OR COMMISSION — CONFIRMATION BY JUSTICES OF SUPREME JUDICIAL COURT.

A proposed act which provides that members of a commission established to conserve a water supply of a city shall be appointed by the mayor of said city and that such appointment shall be confirmed by the justices of the Supreme Judicial Court where the commission so appointed is an executive or administrative department of the municipality and performs no duty properly incidental to the administration of justice in or by the courts, if enacted would be unconstitutional and void.

On behalf of the Committee on Water Supply you have inquired whether or not it is "constitutional and lawful for the Legislature to provide that members of a commission appointed to conserve a water supply of a city shall be appointed by the mayor of said city and that the said appointment shall be confirmed by the justices of the Supreme Judicial Court."

To the
Committee on
Water Supply.
1913
May 7.

Since the appointments of the commissioners are to be made by the mayor of the city, I assume that the commission, when

constituted and established, is intended to form an executive or administrative department of the municipality which is not in any way directly responsible to the Supreme Judicial Court, does not return to said court an account of its doings for any judicial action in the premises, and performs no duty which is properly incidental to the administration of justice in or by the courts. Upon this assumption, I am of opinion that the confirmation of such appointments does not involve the exercise of any judicial function and, therefore, cannot be imposed upon the justices of the Supreme Judicial Court, or any of them, and that the provision to which your inquiry refers, if enacted, will be unconstitutional and void as being in contravention of the provision of Article XXX. of the Declaration of Rights, that "the judicial (department) shall never exercise the legislative and executive powers, or either of them." See case of *Super-visors of Election*, 114 Mass. 247.

VETERAN IN THE SERVICE OF THE COMMONWEALTH —RE-TIREMENT — ELECTIVE OFFICER.

The provision of St. 1907, c. 458, § 1, that "a veteran of the civil war in the service of the Commonwealth, if incapacitated for active duty, shall be retired from active service, with the consent of the governor, . . ." does not apply to elective officers and therefore does not include registers of probate.

To the Auditor
of the Common-
wealth.
1913
May 22.

Under date of May 17 you inquire whether or not a register of probate who complies with the conditions and requirements of chapter 458 of the Acts of 1907 is eligible for retirement thereunder. This statute provides in section 1 that —

A veteran of the civil war in the service of the Commonwealth, if incapacitated for active duty, shall be retired from active service, with the consent of the governor, at one half the rate of compensation paid to him when in active service, to be paid out of the treasury of the Commonwealth: *provided*, that no veteran shall be entitled to be retired under the provisions of this act unless he shall have been in the service of the Commonwealth at least ten years. But if, in the opinion of the governor and council, any veteran of the civil war in said service is incapacitated to such a degree as to render his retirement necessary for the good of the

service, he may so be retired at any time. A veteran retired under the provisions of this act, whose term of service was for a fixed number of years, shall be entitled to the benefits of the act without reappointment.

Registers of probate receive salaries from the Commonwealth and are, therefore, in the service of the Commonwealth, if elective officers may be said to be in such service.

The phrase "service of the Commonwealth" is broad enough to include elective officers, but I am of opinion that the statute was not intended to apply to them. For one reason, it vests in the Governor and Council the power to retire the incumbent of an office at any time when the good of the service, in the judgment of the Governor and Council, may so require, and this right seems to me to be too sweeping and novel to have been intended to be applicable to elective officers generally. Again, in the concluding sentence, it is stated that "a veteran retired under the provisions of this act, whose term of service was for a fixed number of years, shall be entitled to the benefits of the act *without reappointment*." If elective officers had been included, it seems to me the words "or re-election" would have been used.

I therefore answer your inquiry in the negative.

STREET OR ELEVATED RAILWAY COMPANY — EMPLOYEE — HOURS OF LABOR.

A proposed act providing that "a day's work for all conductors, guards, drivers, motormen, brakemen and gatemen who are employed by or on behalf of a street railway or elevated railway company shall not exceed nine hours, and shall be so arranged by the employer that it shall be performed within eleven consecutive hours," and that "on legal holidays and on Sundays and in case of accident or unavoidable delay extra labor may be performed for extra compensation," if enacted, would prohibit the employment by a street railway or elevated railway company of any employee, even if such employee so desired, for more than nine hours in any one day, such employment to be performed in eleven consecutive hours, except on legal holidays and on Sundays or in case of accident or unavoidable delay.

I have the honor to submit herewith my opinion with reference to the order passed on May 26, 1913, and submitted to me under date of May 27, as follows: —

To the House
of Representatives.
1913
June 2.

Ordered, That the opinion of the Attorney-General be requested upon the following important question, to wit: Under House Bill No. 2518 can an employee of the character mentioned in the bill, if he so desires, work longer hours than those prescribed in the bill?

House Bill No. 2518 reads as follows:—

SECTION 1. Chapter five hundred and thirty-three of the acts of the year nineteen hundred and twelve is hereby amended by striking out sections two and three and inserting in place thereof the following:—

Section 2. A day's work for all conductors, guards, drivers, motormen, brakemen and gatemen who are employed by or on behalf of a street railway or elevated railway company shall not exceed nine hours, and shall be so arranged by the employer that it shall be performed within eleven consecutive hours. No officer or agent of any such company shall require from said employees more than nine hours' work for a day's labor. Threat of loss of employment or threat to obstruct or prevent the obtaining of employment by the employees, or threat to refrain from employing any employee in the future shall be considered coercion and "requiring" within the meaning of this section. On legal holidays and on Sundays and in case of accident or unavoidable delay extra labor may be performed for extra compensation.

SECTION 2. A company which violates any provision of this act shall forfeit for each offence not less than one hundred dollars nor more than five hundred dollars.

SECTION 3. This act shall not affect any written contract existing at the date of its passage.

For the purposes of this inquiry I assume the question to be whether or not it will be lawful for an employee affected by said bill, if he so desires, to work longer hours than those prescribed in the bill. In its final analysis the question resolves itself into an inquiry as to whether or not a street railway company which would be affected by the passage of this bill may permit labor to be performed outside of the time prescribed in said bill.

It is a familiar rule of interpretation of statutes that when certain exceptions are named in an act, other exceptions are thereby excluded. The natural conclusion under this rule would therefore be that when the last sentence of section 1 of the bill makes certain exceptions to its prohibitions, in the following language: "On legal holidays and on Sundays and

in case of accident or unavoidable delay extra labor may be performed for extra compensation," the exceptions so named are the only occasions when the employee may perform labor outside of the time prescribed in said section. Consideration of previous legislation covering the same subject confirms this conclusion. Section 3 of chapter 533 of the Acts of 1912 provides as follows with reference to this particular contingency: —

On legal holidays and on Sundays and in case of unavoidable delay or other emergency, or at any time at the request of the employee, extra labor may be performed for extra compensation.

It is to be noted that the present bill omits the words "or other emergency, or at any time at the request of the employee," thereby showing the intention to eliminate the occasions so omitted and to limit more definitely the exceptions to those contained in the bill under consideration, which, it may be observed, include the word "accident," which was not in the 1912 act. The conclusion therefore seems to be irresistible that this bill should be construed to limit the labor of employees covered by it so that it shall not exceed nine hours, so arranged that it shall be performed within eleven consecutive hours, except on legal holidays and on Sundays and in case of accident or unavoidable delay. I assume that the provision that on these occasions "extra labor may be performed" should be construed to authorize the employers to require the extra labor so permitted. Upon consideration of section 1 alone, I am forced to the conclusion that upon any other occasion it will not be lawful for the employer to permit other work even if the employee so desires it.

The provisions of section 2, that "a company which violates any provision of this act shall forfeit for each offence," etc., also confirms this conclusion. The penalty provided is not against the requirement by the employer of more than nine hours' work for a day's labor but is against a violation of *any provision* of this act. The provisions declared in said section 1 which might be violated by the employer are: that a day's work shall not exceed nine hours; that they shall be so arranged

that the labor may be performed within eleven consecutive hours, and that the employer shall not require more than the nine hours' work so established. It would seem that under the broad provisions of this penalty clause, except as permitted by the exceptions hereinbefore referred to, an employer exceeding nine hours of labor or permitting such labor to be performed outside of the eleven consecutive hours provided by the bill, even at the request of an employee, would be subject to the penalty so prescribed. The employer, therefore, will be prevented, in my opinion, from allowing more than the nine hours' work except upon the occasions already noted if said House Bill No. 2518 becomes a law in its present form. If it is desired to leave the situation so that the employee may, if he so desires, perform labor outside of the times prescribed in said act, I respectfully suggest that the bill should be amended to make this clear.

STATUTE — CONSTRUCTION OF CONTRADICTION PROVISIONS —
SALE OF EGGS WHICH BY REASON OF DECAY OR DECOMPOSITION ARE UNFIT FOR FOOD — PROHIBITION.

The effect of St. 1913, c. 654, § 1, providing that "it shall be unlawful . . . to sell, offer for sale, expose for sale, or have in possession with intent to sell, eggs that are unfit for food within the meaning of this act," is limited to the sale, exposure for sale or intent to sell eggs which by reason of decay or decomposition are unfit for food, notwithstanding that by section 2 such statute is declared to be applicable to "eggs, which, either before or after removal from the shell, are wholly or partly decayed or decomposed," and that from the viewpoint of the chemist the process of decay or decomposition in eggs begins immediately after they have been laid.

To the State
Board
of Health.
1913
June 6.

By a letter dated May 24 you have submitted for my consideration an inquiry relating to St. 1913, c. 654, which is entitled "An Act relative to the sale and use of eggs unfit for food." This inquiry is in terms as follows: —

Section 1 of this chapter states in a general way that eggs that are unfit for food shall not be sold, offered for sale, exposed for sale or had in possession with intent to sell.

Section 2 defines under what conditions eggs shall be deemed to be unfit for food. This definition, however, would seem to be absolutely

inadequate, inasmuch as in accordance with expert chemical opinion eggs begin to decompose immediately after they are laid, so that strictly enforced this law would practically prohibit the sale for food of all eggs of whatever age or character.

Will you not, at your earliest convenience, advise this Board as to what lines of action it should pursue under the circumstances?

Section 1 of chapter 654 provides that —

It shall be unlawful . . . to sell, offer for sale, expose for sale, or have in possession with intent to sell, eggs that are unfit for food within the meaning of this act.

Section 2 is as follows: —

This act shall apply to eggs, which, either before or after removal from the shell, are wholly or partly decayed or decomposed, and to eggs in the fluid state, any part of which is wholly or partly decayed or decomposed, and to eggs, in the fluid state or otherwise, that are mixed with parts of eggs which are derived from eggs that are wholly or partly decayed or decomposed. This act shall also apply to frozen masses of broken eggs, if the mass contains eggs that are wholly or partly decayed or decomposed, or that are mixed with parts of eggs that have been taken from eggs that were wholly or partly decayed or decomposed.

Section 3 provides that —

It shall be unlawful for any person, firm or corporation, or any officer, agent or employee thereof, to use eggs that are either wholly or partly decayed or decomposed in the preparation of food products. And it shall be unlawful to deliver, sell, purchase or accept wholly or partly decayed or decomposed eggs in or at any establishment where food products are prepared or manufactured.

Section 5 provides that —

The state board of health shall enforce the provisions of this act.

Section 6 provides that —

Nothing in this act shall be construed to prohibit the purchase, sale or possession for other than food purposes of rotten, decayed or partly decayed eggs which are unfit for food.

The provisions above quoted are loosely drawn and inartificial in terms, but it is, in my opinion, clear from a consideration of

the act as a whole that it was intended as a prohibition against the sale of eggs which by reason of decay or decomposition are unfit for use as food. It may be true that standing alone the language of sections 2 and 3 is broad enough to include all eggs which are wholly or partly decayed or decomposed without reference to their fitness or unfitness to be used as food, but if, as stated in your inquiry, decomposition and decay in eggs begin immediately after they are laid, a literal construction of said sections would prohibit any sale of eggs which could not have been the intent of the Legislature. The language of these sections must, therefore, be so far modified by the other provisions of the act as to limit the prohibitions contained therein to eggs which by reason of decay or decomposition are unfit for food. Any other construction would result in an absurdity.

INTOXICATING LIQUORS — SIXTH CLASS LICENSE — BREACH OF CONDITION — TERMINATION — FORFEITURE — UNLAWFUL SALE — CONVICTION OF CLERK OF LICENSEE.

Under the provisions of R. L., c. 100, § 17, that each license to sell intoxicating liquors issued under the provisions of said section shall be subject, among others, to the condition "that the license shall be subject to forfeiture, as herein provided, for breach of any of its conditions; and that, if the licensee is convicted of a violation of any of such conditions, his license shall thereupon become void," the conviction of the clerk of a licensee holding a sixth class license of an unlawful sale of intoxicating liquor does not in and of itself render such license void, although such conviction constitutes a breach of the conditions of such license which renders it liable to forfeiture.

To the Board
of Registration
in Pharmacy.
1913
June 11.

The Board of Registration in Pharmacy has requested my opinion upon the following question: "If the clerk of a licensee holding a sixth class license is convicted of the unlawful sale of intoxicating liquor, does such conviction render null and void and cause a forfeiture of said license, and disqualify said licensee in the same manner as if he, the licensee, had been convicted of said unlawful sale?"

If I understand correctly the question in the minds of the Board, the inquiry might be expressed in other words as follows: If the clerk employed by a registered pharmacist holding

a sixth class license to sell intoxicating liquor is convicted of the unlawful sale of intoxicating liquor, does the conviction of the clerk, in and of itself, without further action by the licensing board of the city or town or by the Board of Registration in Pharmacy, render null and void the license of the clerk's employer, in the same manner as if the employer himself, the licensee, had been convicted of said unlawful sale?

In my opinion the question as stated must be answered in the negative. R. L., c. 100, § 17, provides as follows:—

Each license shall be expressed, to be subject to the following conditions:—

.

Seventh, That the license shall be subject to forfeiture, as herein provided, for breach of any of its conditions; and that, if the licensee is convicted of a violation of any of such conditions, his license shall thereupon become void.

It is clear that under this provision of the statute if the employer himself, the licensee, is convicted of a violation of any condition of his license, it thereupon becomes void without further act by any board or commission; but the conviction of the employer's clerk is not the conviction of the employer himself, and the provision of the statute that the license shall be subject to forfeiture is not the same in effect as the provision of the statute that upon conviction of the licensee the license shall thereupon become void.

The unlawful sale of intoxicating liquor by the clerk is a breach of the conditions of the license, rendering the license subject to forfeiture, but this breach of the conditions of the license does not, in and of itself, work a forfeiture of the license. The forfeiture itself results from action taken by the licensing board under the provisions of R. L., c. 100, § 47, as amended by St. 1908, c. 108, which are as follows:—

The licensing board, after notice to the licensee and reasonable opportunity for him to be heard by them or by a committee of the mayor and aldermen or selectmen, if the license was granted by them, may declare his license forfeited, or may suspend his license for such period of time as

they may deem proper, upon satisfactory proof that he has violated or permitted a violation of any condition thereof, or any law of the commonwealth. The pendency of proceedings before a court or justice shall not suspend or interfere with the power herein given to decree a forfeiture. . . .

The same practical result as that following a conviction of a violation of a condition of a license and that resulting from a forfeiture declared by the licensing board may also be effectuated by action taken by the Board of Registration in Pharmacy under section 23 of chapter 100 of the Revised Laws as finally amended by St. 1909, c. 261. By section 23 the Board is authorized to issue to registered pharmacists certificates stating that in its judgment they are proper persons to be entrusted with a sixth class license, and in the final clause of the section it is provided —

The board may, after giving a hearing to the parties interested, revoke or suspend such certificate for any cause that it may deem proper, and such revocation or suspension shall revoke or suspend the sixth class license granted thereon.

While the jurisdiction of the Board of Registration in Pharmacy, under the provision last quoted, is limited to action upon the certificate of fitness, so called, yet, if the action of the Board is to suspend or revoke that certificate of fitness, such suspension or revocation by operation of law causes a suspension or revocation of the license itself.

The answer to the question of the Board may, therefore, be summed up as follows: In cases where the licensee himself is convicted of a violation of the conditions of his license, the license becomes void merely through the fact of conviction, and no further action by the licensing board or by the Board of Registration in Pharmacy is necessary. In cases where there has been a breach of any of the conditions of the license, but the licensee himself has not been convicted of a violation of the conditions of the license, it is necessary for the licensing board, after hearing, to declare the license forfeited, in order to effect a forfeiture. In cases where the license has not become void through conviction of the licensee of a violation of the condi-

tions of the license, and where the license has not been declared forfeited by the licensing board, the same practical result as under the two methods mentioned may be brought about by a revocation or suspension by the Board of Registration in Pharmacy of the certificate of fitness granted to the licensee under the provisions of R. L., c. 100, § 23, and its amendments.

WEYMOUTH BACK RIVER — ATTORNEY-GENERAL — “COST AND EXPENSES” INCIDENTAL TO CONSTRUCTION OF BRIDGE — APPORTIONMENT BETWEEN COMMONWEALTH AND COUNTIES OF NORFOLK AND PLYMOUTH — DISCOUNT OR INTEREST ON LOANS.

In St. 1911, c. 739, as amended by St. 1912, c. 227, which established a commission to build a bridge over Weymouth Back River, the expense thereof to be apportioned between the Commonwealth and the counties of Norfolk and Plymouth, the words “cost and expenses,” as used in section 7, providing that “the cost and expenses incurred under the provisions of this act . . . shall be borne as follows: forty-five per cent by the commonwealth of Massachusetts, twenty per cent by the county of Norfolk, twenty per cent by the county of Plymouth, . . .” do not include interest on money borrowed by said counties.

In a letter of recent date you have stated that the commission authorized by chapter 739 of the Acts of the year 1911, as amended by chapter 227 of the Acts of 1912, to build a bridge over Weymouth Back River has practically finished its duties, and that before the Commonwealth’s portion of the cost is paid you wish to obtain my opinion upon the question “whether the words ‘cost and expenses’ as used in the first line of section 7 of chapter 739 of the Acts of 1911 are to be construed as including discount or interest on loans. In other words, is the State expected to bear its proportion of the expense for interest?”

It does not appear either from the statements in your letter or from the provisions of the statute referred to how the question presented by you arises in connection with the duties of your department at the present time in such a manner as to call for an opinion as to the rights of the Commonwealth under the act.

To the Auditor
of the Commonwealth.
1913
June 13.

St. 1911, c. 739, § 6, provides as follows: —

When the said bridge and approaches are completed, and the full cost and expenses of the same, including damages, if any, awarded under the preceding section are ascertained, the said bridge commissioners shall file, in the office of the clerk of the superior court for the county of Norfolk, their report of the fact, together with a detailed statement of the amount of the cost and expense, whereupon and upon the application of said bridge commissioners or of any party interested, and after such notice as the court may order, a hearing shall be had upon the approval and acceptance of the said statement, and when the same has been approved and accepted by the court it shall be binding upon all parties interested.

I understand that the report and statement of the amount of the cost and expense required by the provisions of this section to be filed by the bridge commissioners in the office of the Superior Court for the County of Norfolk have not yet been filed, for I assume that the Commonwealth, through this department, would be notified by the bridge commissioners of the filing of such report and would be given an opportunity to avail itself of the right granted by the section quoted to be heard upon the question of the approval and acceptance of the report and statement.

If I am correct in assuming that the report of the bridge commissioners has not yet been filed, it would seem that the only officials now having the question of the items to be included under "cost and expense" properly before them are the bridge commissioners themselves.

It is at least doubtful whether the bridge commissioners would be entitled to ask for an official opinion from the Attorney-General upon the question, and since the Commonwealth is one of the parties to the apportionment to be made under the statute, and will in the usual course be represented by the Attorney-General in any hearing upon the question of the acceptance and approval of the report of the bridge commissioners filed in court, the Attorney-General so representing a party to the apportionment is hardly in a position to give an opinion which should be considered as having a binding force upon the conduct of the bridge commissioners.

I assume, however, that at some stage of the proceedings, if

occasion arises, all the parties interested, including the Commonwealth, will have opportunity to state their contentions, and, upon the theory that this case may have the effect of a precedent for the determination of other questions which may arise in your department, I have no objection to stating, for your information, my views upon the proper construction of the statute, as indicating what the contention of the Commonwealth will be if occasion arises for stating the position of the Commonwealth upon the matter of the apportionment of the expenses incurred under this act.

In my opinion, the words "cost and expense" as used in the act are not to be construed as including interest on money borrowed by the counties of Norfolk and Plymouth.

The meaning of the act is, at first glance, somewhat obscured by the use of the words "cost and expense" instead of the word "cost" alone, but in my opinion the word "expense" adds nothing to the word "cost," and nothing is to be construed as included under the term "cost and expense" which would not have been included under the term "cost" alone.

Section 6 of the act quoted above provides that "when the said bridge and approaches are completed, and the full cost and expenses of the same," that is, the bridge and approaches, including damages, are ascertained, the commissioners shall file their report and statement, and that that statement, when approved and accepted by the court, shall be binding on all parties interested. Section 7 of the act provides as follows: —

The cost and expenses incurred under the provisions of this act, approved by the court as aforesaid, shall be borne as follows: forty-five per cent by the commonwealth of Massachusetts, twenty per cent by the county of Norfolk, twenty per cent by the county of Plymouth, and fifteen per cent by any street railway company that may apply for and be granted a location on said bridge by the towns of Weymouth and Hingham in the manner now provided by law; and the county of Plymouth and the county of Norfolk shall thereupon be reimbursed for such sums of money as they have respectively expended under the provisions of this act by said parties and to the extent necessary to cause the cost and expense as aforesaid to be borne in the proportions aforesaid: *provided, however*, that any sums that may be received from the United States

in reimbursement of these expenditures shall be distributed as follows: forty-five per cent to the commonwealth of Massachusetts, twenty per cent to the county of Norfolk, twenty per cent to the county of Plymouth, and fifteen per cent to the street railway company.

The interest which the counties are required to pay upon the money borrowed is not strictly a part of the actual cost of the bridge and approaches constructed under the provisions of the act. Only the full cost and expense of constructing the bridge and approaches is, however, to be included in the statement filed by the commissioners under the provisions of section 6 and approved by the court under the same section. Under the provisions of section 7, only the cost and expenses approved by the court "as aforesaid" are to be apportioned between the parties.

The words "cost and expenses incurred hereunder," as used in section 2, when considered with the context and in the light of decisions of the court under somewhat similar statutes, have no broader meaning.

Under section 2 the county commissioners of Norfolk and Plymouth are "authorized and directed to borrow on the credit of their respective counties such sums of money as may from time to time be required for the said cost and expenses." To construe "said cost and expenses," to meet which the county commissioners are required to borrow money, as including the cost of borrowing that money would be an unusual construction of an act of this nature. The words "cost and expenses" are rather to be limited to the actual cost of doing the work provided for by the act.

The interest upon the money borrowed is to be regarded as a burden which the counties are obliged to assume for the purpose of putting themselves in a position to do the things which they were required to do under the terms of the act.

The question in its essence is similar to that presented in the case of *Old Colony Railroad Co., petitioner*, 185 Mass. 160. The statute under consideration in that case was St. 1892, c. 433, which provided in section 2 as follows: —

The alterations and improvements prescribed by said commission shall be made by the Old Colony Railroad Company, and the expense

thereof paid by it, and for that purpose it may issue its stock from time to time, etc.

Section 3 of the same statute provided that the Commonwealth should "repay to said railroad company forty-five per cent of the cost incurred by said company in carrying out said alterations and improvements, as audited and approved by the auditors."

The railroad claimed in that case that money paid by way of interest on money used to pay for the alterations was a part of the "actual cost." The court said: —

In a broad sense this is true of a railroad company which is obliged to hire money to meet the obligation imposed by the statute.

But it held that it was not the intent of the statute to include such an item under the term "cost incurred," saying: —

That such a construction would open the door to let in claims that would be not only large in amount, but uncertain and contingent in their character, is reasonably clear.

In my opinion, the reasoning in that decision and in the cases cited therein is applicable to the question presented by you.

HOURS OF LABOR — EMPLOYEES OF STREET AND ELEVATED
RAILWAY COMPANIES — REGULATION — LEGISLATURE —
CONSTITUTIONAL LAW — POLICE POWER — CONSTRUCTION
OF STATUTE.

The reasonable regulation of the hours of labor for employees of a street or elevated railway company in such a manner as to conserve the health, safety and welfare of the public constitutes a proper exercise of the police power.

In passing an act to provide that "a day's work for all conductors, guards, drivers, motormen, brakemen and gatemen who are employed by or on behalf of a street railway or elevated railway company shall not exceed nine hours, and shall be so arranged by the employer that it shall be performed within eleven consecutive hours," it must be presumed that the Legislature had in view the protection of the health, safety and welfare of the public, and it cannot be said either that such act has no reasonable relation to the object for which it was enacted or that the Legislature could not have found, upon evidence presented to it, that a condition of affairs existed which required its action in the premises.

Where the question of the constitutionality of a statute is doubtful, the doubt should be resolved in favor of the statute.

To the
Governor of
the Common-
wealth.
1913
June 14.

Your Excellency has requested my opinion upon the constitutionality of House Bill No. 2518, entitled "An Act relative to the hours of labor of employees of street railway companies," which is before you for approval or disapproval. The bill in its final amended form provides as follows:—

SECTION 1. Chapter five hundred and thirty-three of the acts of the year nineteen hundred and twelve is hereby amended by striking out sections two and three and inserting in place thereof the following:—

Section 2. A day's work for all conductors, guards, drivers, motormen, brakemen and gatemen who are employed by or on behalf of a street railway or elevated railway company shall not exceed nine hours, and shall be so arranged by the employer that it shall be performed within eleven consecutive hours. No officer or agent of any such company shall require from said employees more than nine hours' work for a day's labor. Threat of loss of employment or threat to obstruct or prevent the obtaining of employment by the employees, or threat to refrain from employing any employee in the future shall be considered coercion and "requiring" within the meaning of this section. But nothing herein shall prevent an employee of the character mentioned in this act, if he so desires, from working more hours than those prescribed in the act for extra compensation.

SECTION 2. A company which violates any provision of this act shall

forfeit for each offence not less than one hundred dollars nor more than five hundred dollars.

SECTION 3. This act shall not affect any written contract existing at the date of its passage.

It hardly needs to be stated that the Attorney-General, in advising the Governor of the Commonwealth upon a question of this nature, is not in the position of a court considering the constitutionality of the act as applied to a specific case which has arisen, and that the opinion of the Attorney-General submitted in reply to such a question has not the force of an adjudication by the court upon the question of the constitutionality of an act which has arisen in a case between parties before it.

Nevertheless, such a question presented to the Attorney-General must be considered within the same limitations within which it would be considered by the court of last resort in a specific case, since the only effect of an opinion of the Attorney-General is to advise the Governor so far as possible as to how the Supreme Court might be expected to rule upon the question now presented, in view of the previously decided cases upon the question.

It has been repeatedly stated in decisions of both the State and Federal courts that questions having to do merely with the policy of legislation and the judgment exercised by the Legislature in its enactment are not matters to be reviewed by the courts. That principle was thus stated in *Chicago, Burlington & Quincy R.R. Co. v. McGuire*, 219 U. S. 549, 569:—

The scope of judicial inquiry in deciding the question of *power* is not to be confused with the scope of legislative considerations in dealing with the matter of *policy*. Whether the enactment is wise or unwise, whether it is based on sound economic theory, whether it is the best means to achieve the desired result, whether, in short, the legislative discretion within its prescribed limits should be exercised in a particular manner, are matters for the judgment of the Legislature, and the earnest conflict of serious opinion does not suffice to bring them within the range of judicial cognizance.

and in *McLean v. Arkansas*, 211 U. S. 547, 548, it is stated as follows:—

The Legislature, being familiar with local conditions, is, primarily, the judge of the necessity of such enactments. The mere fact that a court may differ with the Legislature in its views of public policy, or that judges may hold views inconsistent with the propriety of the legislation in question, affords no ground for judicial interference, unless the act in question is unmistakably and palpably in excess of legislative power.

The policy of the legislation in question, therefore, I do not discuss.

The Constitution of Massachusetts provides in Part the Second, Chapter I., Section I., Article IV., as follows:—

And further, full power and authority are hereby given and granted to the said general court, from time to time to make, ordain, and establish, all manner of wholesome and reasonable orders, laws, statutes, and ordinances, directions and instructions, either with penalties or without; so as the same be not repugnant or contrary to this constitution, as they shall judge to be for the good and welfare of this commonwealth, and for the government and ordering thereof, and of the subjects of the same, and for the necessary support and defence of the government thereof.

It is to be presumed that the Legislature attempted to act under and in accordance with this provision in formulating the bill presented, and the judicial question presented is whether, in so doing, it has in fact exceeded its constitutional powers.

The only contention which has been raised in this regard is that it unwarrantably deprives those who are subject to it of the liberty guaranteed both by the State and Federal constitutions, which, it is well established by many decisions, includes the right of contract.

Both property and liberty, however, are held subject to such reasonable conditions as may be imposed by the governing power in the exercise of those powers called "police powers," which do not permit of exact definition but are generally described in the decisions of the United States Supreme Court as "relating to the safety, health, morals and general welfare of the public."

The question of regulating the hours of labor for men has been one of great difficulty and has resulted in much difference of opinion by the courts. It must be settled on considerations

differing somewhat from those determining the right to regulate the hours of governmental employment and the hours of labor of women and children. In the case of *Holden v. Hardy*, 169 U. S. 366, the court, with two justices dissenting, sustained as a valid exercise of the police power a statute of the State of Utah entitled "An Act regulating the hours of employment in underground mines and in smelters and ore reduction works," which limited to eight hours per day the period of employment in all underground mines and in smelters and all other institutions for the reduction or refinement of ores or metals, except in case of emergency. The court, in the course of its opinion, said: —

These employments, when too long pursued, the Legislature has judged to be detrimental to the health of the employees, and, so long as there are reasonable grounds for believing that this is so, its decision upon this subject cannot be reviewed by the Federal courts.

In the case of *Lochner v. New York*, 198 U. S. 45, the court, with three justices dissenting, reversed a decision of the highest court of New York and held unconstitutional a statute limiting to sixty hours in any one week the period of employment in a biscuit, bread or cake bakery or confectionery establishment, and containing no emergency clause, as not within the limits of the police power, for the reason that it did not appear that the health of either the employees or the public was directly involved.

Some features are presented by the bill now before Your Excellency which were not present in the legislation before the courts in the cases cited. The employees to which the bill applies are employed in operating cars of a street railway company. The matter of public safety may, therefore, have been considered by the Legislature as directly involved in connection with the health of the employee. From the viewpoint of the safety of the public it is a matter of common knowledge that a high degree of efficiency in the persons operating the cars is desirable. In the case of *Baltimore & Ohio R.R. Co. v. Interstate Commerce Commission*, 221 U. S. 612, 619, it is said: —

The length of hours of service has direct relation to the efficiency of the human agencies upon which protection of life and property necessarily depend.

Another distinctive feature of the legislation now in question is that it deals with public corporations and the use of public franchises, and for that reason the Legislature may be considered as having wider jurisdiction under the police power than it would have in a matter involving private contracts.

Since 1893 there has existed upon the statute books of this Commonwealth a law providing that not more than ten hours of labor a day should be exacted of employees of street railway companies. I am not aware that in this Commonwealth the question as to the constitutionality of that provision has been presented to the Supreme Court. In an opinion to the Governor of Rhode Island on June 24, 1902, the Supreme Court of Rhode Island, however, advised that a similar statute was constitutional. 24 R. I. 603. A short time after that opinion was rendered, the Rhode Island statute was so amended as to give the employees of a street railway company opportunity to work more than ten hours a day, if they so desired, and that law, which in its amended form closely corresponds to the bill now before Your Excellency, has remained upon the statute books of Rhode Island without challenge since its enactment.

In the case of *Chicago, Burlington & Quincy R.R. Co. v. McGuire*, 219 U. S. 549, 569, the court, after citing many cases involving the exercise of the police power, said: —

The principle involved in these decisions is that where the legislative action is arbitrary and has no reasonable relation to a purpose which it is competent for government to effect, the Legislature transcends the limits of its power in interfering with liberty of contract; but where there is reasonable relation to an object within the governmental authority, the exercise of the legislative discretion is not subject to judicial review.

In the case of *McLean v. Arkansas*, 211 U. S. 547, 548, the court said: —

If there existed a condition of affairs concerning which the Legislature of the State, exercising its conceded right to enact laws for the protection

of the health, safety or welfare of the people, might pass the law, it must be sustained; if such action was arbitrary interference with the right to contract or carry on business, and having no just relation to the protection of the public within the scope of legislative power, the act must fail.

Discussing merely the constitutional question which has been presented to me, I cannot say either that the legislation under discussion has no reasonable relation to the object which I am bound to presume the legislation had in view, the protection of the health, safety and welfare of the public, or that the Legislature cannot have found upon evidence presented to it, which, however, is not before me, that a condition of affairs existed which required it to enact the legislation in question for the protection of the health, safety and welfare of the people.

In view, also, of the provision that the employees may, if they so desire, work more than nine hours in a day, for extra compensation, the bill does not upon its face appear to be so unreasonable and extravagant as to be adjudged an arbitrary interference with the right of contract. The contention that the Legislature had in view the public health and safety is not necessarily negatived by the permissive feature in the latter part of the bill with reference to the employees. The Legislature may have presumed that the employees would not desire to work longer than the hours prescribed unless they were physically able and competent to do so. While it appears by this provision that the Legislature has not gone as far as it might have attempted to in protecting the public health and safety, it does not for that reason make less valid the protection afforded by the enactment.

It is a rule of constitutional construction that in case of a reasonable doubt the court is bound to resolve the doubt in favor of the statute.

In view of all these considerations I am led to the conclusion that there is a strong probability that the court of last resort would not declare this act unconstitutional.

STATE BOARD OF INSANITY — APPOINTMENT OF AGENT TO FILL
NEW POSITION — APPROPRIATION.

Under the provision of St. 1909, c. 504, § 4, that the State Board of Health "may appoint agents and subordinate officers and fix their compensation, but the amount paid for their salaries shall not exceed the appropriation of the general court for that purpose," a position may be created by such Board and an agent appointed to fill it at any time if the salary for such agent as fixed by such Board may be paid from the existing appropriation.

To the
State Board
of Insanity.
1913
June 18.

You have inquired whether you "may appoint, under section 4, chapter 504, Acts of 1909, an agent to a new position about to be created by the Board, for whom no provision was made at the time the appropriation for salaries was granted, but whose salary will be paid from the appropriation for this department provided it is sufficient."

The section to which your inquiry refers is as follows:—

The board may appoint agents and subordinate officers and fix their compensation, but the amount paid for their salaries shall not exceed the appropriation of the general court for that purpose. The board may delegate any of its powers and duties to, and may execute any of its functions by, agents appointed for that purpose or by committees of the board. The board shall hold meetings each month, and oftener if necessary. It shall make its own by-laws, and shall annually report its doings to the governor and council on or before the third Wednesday in March, the report being made up to and including the thirtieth day of November.

Under this provision the Board is authorized to appoint such agents as may be necessary for the transaction of its business and to fix their salaries, provided that the amount of the salaries so fixed does not exceed the amount appropriated by the Legislature for the payment of such salaries. This being so, I see no reason why a position may not be created and an agent appointed to fill it at any time if the salary of such agent as fixed by the Board may be paid from the existing appropriation as required by the section above quoted; and it is, in my opinion, immaterial that the position in question had not been created at the time such appropriation was made.

COLLATERAL LOAN COMPANY — INCREASE OF CAPITAL STOCK
— COMMISSIONER OF CORPORATIONS — APPROVAL.

The Collateral Loan Company, which is a loan agency engaged in the business of making small loans, is a "corporation heretofore organized by special act of the legislature for a purpose or purposes for which corporations may be organized under the provisions of chapter four hundred and thirty-seven of the acts of the year nineteen hundred and three and acts in amendment thereof or in addition thereto," and is therefore within the provision of St. 1912, c. 586, § 1, that such corporations shall be subject to the provisions of St. 1903, c. 437, in respect to the amount of real or personal property which they may hold and may from time to time increase or decrease their capital stock in accordance with the provisions of such chapter.

The Commissioner of Corporations may, therefore, approve an increase of the capital stock of the Collateral Loan Company duly made in accordance with the requirements of St. 1903, c. 437, §§ 40, 41 and 42.

You have requested my opinion upon the question whether you may approve as conforming to the requirements of law certain articles of amendment to its agreement of association which provide for an increase of capital stock, submitted to you for approval under the provisions of St. 1903, c. 437, by the Collateral Loan Company, purporting to act under authority of St. 1912, c. 586.

To the Com-
missioner of
Corporations.
1913
July 10.

St. 1912, c. 586, § 1, provides as follows:—

Every corporation heretofore organized by special act of the legislature for a purpose or purposes for which corporations may be organized under the provisions of chapter four hundred and thirty-seven of the acts of the year nineteen hundred and three and acts in amendment thereof or in addition thereto, except corporations which are empowered to manufacture, store, transmit, sell or distribute power, which now is or may hereafter become subject to said chapter four hundred and thirty-seven, shall hereafter, despite any provisions contained in its charter, be subject to said chapter in respect to the amount of real or personal property which it may hold, and may from time to time increase or decrease its capital stock in accordance with the provisions of said chapter four hundred and thirty-seven.

St. 1903, c. 437, § 40, provides as follows:—

Every corporation may, at a meeting duly called for the purpose, by the vote of a majority of all its stock, or, if two or more classes of stock have been issued, of a majority of each class outstanding and entitled to

vote, authorize an increase or a reduction of its capital stock and determine the terms and manner of the disposition of such increased stock, may authorize a change, etc.

Section 41 of the same chapter provides: —

Articles of amendment signed and sworn to by the president, treasurer and a majority of the directors shall, within thirty days after said meeting, be prepared, setting forth such amendment or alteration, and stating that it has been duly adopted by the stockholders. Such articles shall be submitted to the commissioner of corporations, who shall examine them in the same manner as the original articles of organization. If he finds that they conform to the requirements of law, he shall so certify and endorse his approval thereon, and they shall thereupon be filed, etc.

Since nothing appears in your letter to the contrary, I assume that the increase in the amount of the capital stock has been made in accordance with the requirements of section 40 above quoted and also in accordance with the provisions of section 42 of the same chapter.

The question presented, therefore, is whether the Collateral Loan Company is included within the provisions of St. 1912, c. 586, as a corporation heretofore organized by special act of the Legislature for a purpose or purposes for which corporations may be organized under the provisions of chapter 437 of the Acts of the year 1903, and acts in amendment thereof or in addition thereto.

The question is somewhat complicated by the peculiar terms of the original act incorporating this corporation, but in my opinion is to be answered in the affirmative.

The doubt concerning the matter arises chiefly from the fact that St. 1903, c. 437, § 1, in providing what corporations should, and what should not, be subject to the business corporation law provides, "it shall not apply to corporations organized under general or special laws of this commonwealth for the purpose of carrying on within the commonwealth the business of a bank, savings bank, trust company, surety or indemnity company, safe deposit company, etc.," and from the fact that this corporation in its original charter and early amendments thereof is designated as a "bank."

The corporation was chartered by St. 1859, c. 173, under the name of "Pawners' Bank," in the following terms:—

with the powers and privileges, and to be governed by the rules and provisions established by law relative to banks in this Commonwealth, so far as applicable to the objects of this institution. It shall not be a bank of issue, and shall loan on pledge of goods and chattels only.

In substantially every section of the act the corporation is spoken of as a bank, although it clearly appears that the object of its incorporation was not the business of a bank in the usual sense of the term but merely the transaction of the business of loaning money on pledge of goods and chattels.

By St. 1869, c. 428, the name was changed to Collateral Loan Company, its present name. The nature of the business to be transacted was not changed by the provisions of this act, and in various sections thereof the corporation was still referred to as a bank.

By St. 1888, c. 170, the corporation was made subject to examination by the Bank Commissioner of the Commonwealth.

But the essential point to be considered in the determination of the question presented is not by what name the corporation is designated but rather for the purpose of carrying on what business the corporation was organized.

Although the corporation was designated as a bank in the charter of the corporation and early amendments thereof, and although it might be considered as a sort of bank with narrowly limited powers, in my opinion it is not to be considered as having been organized "for the purpose of carrying on within the commonwealth the business of a bank," within the meaning of the term as used in the business corporation law of 1903.

At the time of the enactment of the business corporation law of 1903 the small loan business was fully recognized, and for many years prior thereto had been recognized as a business differing from an ordinary banking business. In the administration of the business corporation law from the date of its enactment to the present time, it has not been considered that corporations carrying on a business similar to that carried on by

the Collateral Loan Company are excluded from the provisions of the act on the ground that they are organized for the purpose of carrying on the business of a bank. Loan companies have been organized in recent years under the provisions of this act of 1903 and have otherwise conformed to the provisions of the act. The Collateral Loan Company itself was included in the original list of corporations existent at the time of the enactment of the business corporation law of 1903, to which that law was to be considered applicable. It has been subjected to the provisions of that law both with reference to taxation and other matters ever since the enactment of the law, with the acquiescence of all parties in interest.

Finally, if further evidence be necessary that for the purpose of classification the corporation is to be considered as organized for the purposes of a loan agency and not for the purpose of carrying on a banking business, that evidence is supplied by St. 1911, c. 727, entitled "An Act to regulate the business of making small loans," which subjects all small loan agencies in this Commonwealth to the supervision of a State officer known as the Supervisor of Loan Agencies, transfers the powers and duties formerly exercised by the Bank Commissioner to this supervisor, and provides in section 23 as follows:—

All parts of the charters of the Collateral Loan Company, Workingmen's Loan Association, Worcester Collateral Loan Association and Chattel Loan Company inconsistent herewith are hereby repealed.

Under the terms of this act any parts of the charter of the Collateral Loan Company which might be considered as being inconsistent with its now being considered and dealt with as a loan agency rather than as a bank are repealed, and the intent of the Legislature that the company shall be placed upon the same basis as other loan agencies is clearly indicated.

As previously stated, loan agencies may be incorporated under the provisions of St. 1903, c. 437, and the Collateral Loan Company is, therefore, to be considered as included among the corporations "heretofore organized by special act of the legislature for a purpose or purposes for which corporations may be organ-

ized under the provisions of chapter four hundred and thirty-seven of the acts of the year nineteen hundred and three," and authorized under the provisions of St. 1912, c. 586, to increase its capital stock in accordance with the provisions of the Acts of 1903.

INSANE PERSON — HOSPITAL — TRUSTEES — AUTHORITY OF
TRUSTEES TO LIMIT NUMBER OF PATIENTS — STATE
BOARD OF INSANITY.

The trustees of a State hospital for the insane have no authority by vote or resolution to limit the number of patients to be treated at such hospital, and if the State Board of Insanity, in the exercise of the power vested in it by St. 1909, c. 504, § 10, to make such recommendations to the trustees of an institution for the insane as it may deem expedient, should recommend that accommodations be provided for additional patients, it would be the duty of such trustees to provide them.

You have sent me a copy of a resolution passed by vote of the trustees and have requested my opinion upon the questions whether the trustees have the power through passing such a resolution to limit the number of patients to be treated at the hospital, and whether the State Board of Insanity may require an increase of accommodations for patients beyond the limit fixed by the trustees.

To the
Trustees of the
Monson State
Hospital.
1913
July 14.

The vote of the trustees was as follows: —

Voted, That the capacity of this hospital should be limited to twelve hundred patients and that the policy of this Board be to ask only for appropriations and buildings sufficient to care for this number of patients.

In my opinion the present laws with reference to the hospital are such that the number of patients to be treated at the hospital may be absolutely limited only by action of the Legislature, and the vote of the trustees has the force only of the expression of their opinion as to the policy the pursuance of which would enable the hospital to do its best work.

The vote could not be given full effect as a practical matter on account of the provisions of law regulating admission of pa-

tients to the hospital. So far as patients are admitted upon application to the trustees, the number of inmates of the hospital is to some extent within the control of the trustees, but, under the provisions of St. 1909, c. 504, § 58, as amended by St. 1911, c. 71, an insane epileptic may be committed to this hospital under the laws applicable to the commitment of other insane persons, without any action being taken by the trustees, and, through the provisions of St. 1909, c. 504, § 12, patients may likewise be committed upon application of the State Board of Insanity. No provision appears to have been made to give the trustees power to control the extent to which the number of inmates of the hospital may be increased by such commitments.

That it is not the intent of the statutes that the trustees of the hospital shall be vested with authority absolutely to fix the limits of the size of the institution seems also to be indicated by the provisions of St. 1907, c. 520, which, by St. 1909, c. 504, § 8, are made applicable to this hospital. Under the provisions of the 1907 act plans for new construction or for alteration or repairs of existing buildings for which it is intended to petition the General Court for appropriations must first be submitted to the State Board of Insanity, and that Board "may require such modifications thereof and additions thereto and such additional information as it may deem necessary."

These various provisions are consistent with the terms of the original act providing for the establishment of the hospital. St. 1895, c. 483. Section 6 of that act is as follows:—

Said trustees shall have the same powers and shall be required to perform the same duties in the management and control of said hospital as are vested in and required of the trustees of the various state lunatic hospitals under sections six, seven and nine of chapter eighty-seven of the Public Statutes.

Section 6 of chapter 87 of the Public Statutes, referring to the trustees of each hospital, provides as follows:—

They shall take charge of the general interests of the institution, and see that its affairs are conducted according to the requirements of the legislature and the by-laws and regulations which the board shall estab-

lish for the internal government and economy thereof; and they shall be reimbursed all expenses incurred in the discharge of their official duties.

Section 7 of the same chapter provides:—

They shall establish by-laws and regulations, with suitable penalties, for the internal government and economy of the institutions, etc.

The effect of these various enactments is that, although the internal government of the institution is in the hands of the trustees, it is not within the power of the trustees absolutely and finally to determine the place of the hospital in the institutional system of the Commonwealth and to limit absolutely the extent of the portion of the field of the care of the insane of the Commonwealth which shall be filled by this particular institution.

So long as "the requirements of the legislature" are that the number of patients shall not be absolutely within the control of the trustees, but that the trustees shall receive patients committed to the hospital by order of court independent of action by the trustees, they are bound to conduct the hospital according to those requirements so far as it is reasonably possible. If in the opinion of the trustees the effectiveness of the institution is impaired by reason of the increase of patients beyond certain limits, the remedy, if it is to be effective, must be by appeal to the Legislature rather than through an attempt to enforce a vote of the trustees which has not the force of law.

The question as to the authority of the State Board of Insanity to require an increase of accommodations beyond the limits fixed by the trustees is substantially answered by what has been said with reference to the legal effect of the vote of the trustees. The providing of accommodations for patients whom the trustees are bound by law to receive is part of the duties of the trustees and is, therefore, required by the statutes rather than by the State Board of Insanity. The State Board of Insanity, however, under the provisions of St. 1909, c. 504, is at the head of the entire system of caring for the insane, the feeble-minded, the epileptics and the dipsomaniacs in the Common-

wealth, with powers of supervision over all public and private institutions and receptacles for such patients. Under section 10 of the statute, providing for visitation and inspection of the hospitals by the Board and authorizing the Board to "make such recommendations to the trustees or superintendent of the institution as it may deem expedient," the Board would not, in my opinion, exceed its powers if, under conditions which seem to it to demand additional accommodations, it should recommend that such accommodations be provided.

TAXATION — DOMESTIC BUSINESS CORPORATION — DISTRIBUTION OF TAX — CANAL COMPANY — CORPORATION HAVING THE RIGHT TO TAKE OR CONDEMN LAND — THE ESSEX COMPANY.

The words "domestic business corporation," as used in St. 1910, c. 456, § 1, providing that the tax assessed upon domestic business corporations under the provisions of St. 1909, c. 490, Part III., shall be distributed, credited and paid to cities and towns or shall be retained by the Commonwealth in the manner therein provided, are to be construed as having the meaning of the same words as used in St. 1909, c. 490, Part III., defined in section 39 to include "every corporation of the classes enumerated in section one of chapter four hundred and thirty-seven of the acts of the year nineteen hundred and three."

By St. 1903, c. 437, § 1, after enumerating the classes of corporations to which such chapter shall apply, it is provided that "it shall not apply to corporations organized under general or special laws of this commonwealth for the purpose of carrying on within the commonwealth the business of a . . . canal, aqueduct or water company . . . or to any other corporations which now have or may hereafter have the right to take or condemn land or to exercise franchises in public ways . . ." It follows that since the Essex Company, which was chartered by special act (St. 1845, c. 163) and owns canals and locks in the city of Lawrence and is vested with the right to take or condemn lands and to exercise franchises in public ways, is excluded from the provisions of St. 1903, c. 437, the business corporation law, it is, therefore, not a domestic business corporation within the meaning of St. 1910, c. 456, § 1.

You have requested my opinion upon the question whether the Essex Company, a corporation chartered by special act (St. 1845, c. 163), owning the canals and locks in the city of Lawrence, is a domestic business corporation within the meaning of section 1 of chapter 456 of the Acts of the year 1910.

St. 1910, c. 456, § 1, provides as follows:—

The tax assessed upon domestic business corporations under the provisions of Part III. of chapter four hundred and ninety of the acts of the year nineteen hundred and nine shall be distributed, credited and paid to cities and towns of the commonwealth or shall be retained by the commonwealth in the manner following: Such part of said tax paid by each of said domestic business corporations as is paid on account of shares of stock of said corporations owned by non-residents of Massachusetts shall be retained by the commonwealth. The remainder of said tax paid by each of said corporations shall be distributed, credited and paid to the city or town of the commonwealth where the business of the corporation is carried on, and if any such corporation maintains an office, store or factory in more than one city or town of the commonwealth this part of the tax paid by it shall be distributed, credited and paid to such cities and towns in proportion to the value of the tangible property of the corporation in each of such cities or towns on the first day of April, as determined from the returns or in any other manner: *provided*, that if any such corporation does not conduct its business in Massachusetts and does not own any tangible property in any city or town of the commonwealth, other than furniture and equipment reasonably necessary for the use of the clerk or other executive officers of such corporation, all of the tax paid by such corporation shall be retained by the commonwealth.

In my opinion the phrase “domestic business corporation,” as used in this act, must be construed as having the same meaning as the same phrase used in Part III. of chapter 490 of the acts of the year 1909. St. 1909, c. 490, Part III., § 39, provides as follows:—

The term “domestic business corporation” as used in this act shall mean every corporation of the classes enumerated in section one of chapter four hundred and thirty-seven of the acts of the year nineteen hundred and three; . . .

Section 1 of chapter 437 of the Acts of 1903 enumerates the classes of corporations to which that business corporation law shall not apply, as well as the classes to which it shall apply; that section 39, above quoted, in referring to “the classes enumerated in section one of chapter four hundred and thirty-seven” can be reasonably construed only as referring to the

classes enumerated in section 1 as subject to the provisions of the business corporation law.

Section 1, after enumerating the classes of corporations to which the law shall apply, provides as follows:—

It shall not apply to corporations organized under general or special laws of this commonwealth for the purpose of carrying on within the commonwealth the business of a bank, savings bank, co-operative bank, trust company, surety or indemnity company, safe deposit company, insurance company, railroad or street railway company, telegraph or telephone company, gas or electric light, heat or power company, canal, aqueduct or water company, cemetery or crematory company, *or to any other corporations which now have or may hereafter have the right to take or condemn land or to exercise franchises in public ways granted by the commonwealth or by any county, city or town.*

In my opinion, by these latter provisions the Essex Company is expressly excluded from the application of the business corporation law. The original charter of the corporation (St. 1845, c. 163) makes the individuals therein named a corporation “for the purpose of constructing a dam across Merrimack river, and constructing one or more locks and canals in connection with said dam, to remove obstructions in said river by falls and rapids, from Hunt’s Falls to the mouth of Shawsheen river, and to create a water power to use, or sell, or lease to other persons or corporations, to use for manufacturing and mechanical purposes.” By section 3 of the same act it is “authorized and empowered to construct and maintain a dam across said river, either at Deer Jump Falls, or Bodwell’s Falls, or some point in said river between said falls, and all such canals and locks as may be necessary for the purposes aforesaid; and for the purpose of making said dam, and constructing the main canal for navigation, or transports, may take, occupy, and inclose any of the lands adjoining said canals and locks, or dam, which may be necessary for building or repairing the same, for towing paths, and other necessary purposes, not exceeding twenty feet on each side of said canal, or locks, and may blow up and remove any rocks in said river, and dig in any of the lands near to said river, through which it may be necessary to pass said main canal.” By section 4 it is provided:—

If there shall be occasion, in the prosecution of the powers and purposes aforesaid, to make a canal across any public highway, or if highways shall hereafter be laid out across such canal, it shall be the duty of said corporation to make sufficient bridges across said canal, and to keep them in good repair.

By section 6 the company is authorized to erect and forever maintain such canal and locks as shall be necessary around any dam constructed by it. By section 9, for the purpose of reimbursing the corporation in part for the cost and expense of keeping the locks and canals in repair, it is authorized to levy tolls.

The original charter has been amended by various acts, but the nature of the corporation has not been changed and its powers have not been altered in such a manner as to affect the question now presented.

While the corporation is authorized by its charter to use the water power which it creates for the purpose of manufacturing, and although it was made subject to the provisions of the thirty-eighth and forty-fourth chapters of the Revised Statutes, and has been in many respects given the powers and privileges and has been subjected to the liabilities of manufacturing corporations, nevertheless, it must, in view of the object of its incorporation and the powers vested in it by its charter, be considered as a canal company within the meaning of section 1 of the business corporation law. This view has recently been taken by the Supreme Court of the Commonwealth, in the case of a petition for tax abatement brought by the Essex Company against the city of Lawrence, 214 Mass. 79, 87. In that case it was said by the chief justice:—

It has been faintly argued that R. L., c. 14, § 42, was repealed by St. 1903, c. 437, § 95. But this is not so, for the reason among others that c. 437, according to § 1, does not apply to a canal corporation, which the petitioner is in some aspects of its charter duties.

In my opinion the corporation is to be considered as excluded from the provisions of the business corporation law also for the reason that it is a corporation having the right to take or con-

demn land or to exercise franchises in public ways granted by the Commonwealth, or by any county, city or town. The corporation was given authority by section 3 of its charter, above quoted, to take or condemn land, and since I have no information that at the time when the business corporation law went into effect the corporation had entirely exhausted its powers to take land, I must assume that at that time this corporation was still a corporation having the right to take land.

In my opinion, therefore, the Essex Company is not a corporation of the classes enumerated in section 1 of chapter 437 of the Acts of 1903 as subject to the provisions of that act, and is not a domestic business corporation within the meaning of that term as used in St. 1910, c. 456.

WEIGHTS AND MEASURES — WEIGHING AND MEASURING DEVICES FOR HIRE OR REWARD — TESTING AND SEALING GAS OR ELECTRIC LIGHT METERS.

Gas or electric light meters are not measuring devices within the meaning of St. 1909, c. 412, § 1, that "the provisions of chapter sixty-two of the Revised Laws relating to the adjustment, testing and sealing of weights, measures and balances shall apply to all weighing and measuring devices used for the purposes of weighing and measuring for hire or reward."

To the
Commissioner
of Weights and
Measures.
1913
September 3.

Under date of August 25 you requested my opinion as follows: —

I would respectfully refer you to section 1, chapter 412, Acts of 1909, which reads as follows: —

"The provisions of chapter sixty-two of the Revised Laws relating to the adjustment, testing and sealing of weights, measures and balances shall apply to all weighing and measuring devices used for the purposes of weighing and measuring for hire or reward."

Will you kindly advise if in your opinion a gas or electric light meter would be a measuring device in the meaning of this section?

In my opinion your inquiry should be answered in the negative.

RAILROAD CORPORATION — BOARD OF RAILROAD COMMISSIONERS — CERTIFICATE THAT REQUIREMENTS OF LAW PRELIMINARY TO INCORPORATION HAVE BEEN COMPLIED WITH — REVISION BY COURT OR OTHER TRIBUNAL — DESCRIPTION OF ROUTE IN AGREEMENT OF ASSOCIATION — CERTIFICATES OF AGREEMENT AS TO ROUTE IN CITIES AND TOWNS — HAMPDEN RAILROAD CORPORATION.

Where the Board of Railroad Commissioners, under the provisions of St. 1906, c. 463, Part II., § 24, has duly certified that the requirements of such chapter preliminary to the incorporation of a railroad corporation under general laws have been complied with, the decision of said Board in the premises should not be considered as subject to revision by any other executive or administrative board or commission.

The powers vested in a railroad corporation organized under general laws with respect to fixing the route of its railroad are to be determined not only from the description of such route contained in its certificate of organization, but also from the certificates fixing the route in the several cities and towns through which such railroad is to pass, as provided in St. 1906, c. 463, Part II., §§ 20-24, inclusive. The Hampden Railroad Corporation may, therefore, construct its railroad upon the route shown to be fixed by the certificates annexed to the agreement of association on file in the office of the Secretary of the Commonwealth in accordance with the provisions of section 24; and the description of the route contained in such agreement of association, so far as it is not required by law and is inconsistent with the route fixed under authority of sections 20 and 21, may be disregarded.

You have requested my opinion upon the question whether, in view of the facts contained in a statement submitted by you, the Hampden Railroad Corporation has kept within the powers conferred upon it by its charter and the laws of the Commonwealth so that the Public Service Commission, acting under St. 1913, c. 784, § 16, may lawfully approve an issue of bonds by that corporation to the amount of \$2,500,000, to provide means for funding its floating debt incurred in the construction and equipment of its railroad; the proposed bonds to be secured by a mortgage of the railroad, its equipment, franchises and all other property now owned by it or hereafter acquired.

The facts submitted by you as bearing upon the question are as follows: —

Acting under St. 1906, c. 463, Part II., §§ 13-28, the associates forming the Hampden Railroad made an agreement of

To the
Public Service
Commission.
1913
September 15.

association, dated June 1, 1910. Copies of this agreement were published as required by section 16 of the statute.

On Aug. 4, 1910, the directors named in the agreement of association petitioned the Railroad Commissioners, under section 18, for a certificate that public convenience and necessity required the construction of a railroad as proposed in said agreement and in the petition and as shown upon certain maps, plans and profiles. These maps, plans and profiles were filed with the petition, together with an estimate of cost and a description of the proposed route of the railroad. Upon this petition an order of notice by publication and service of copy was issued by the Board of Railroad Commissioners on Aug. 4, 1910. After hearing on the petition and a contest, the Railroad Commissioners, on Sept. 20, 1910, issued a certificate of public convenience and necessity, under section 18. In this certificate the Board called attention to the fact that two features of the proposed railroad remained open for discussion; the location in the city of Chicopee, and the location in the city of Springfield. It was stated that since the route through the city of Chicopee, as proposed, was subject to local objection, the Board would take note of the suggestion of the municipal authorities of that city if it became the duty of the Board of Railroad Commissioners to fix the route therein. It stated that if it became the duty of the Board to fix the route in the city of Springfield, the Board in fixing the route in that city would take note of the river front improvements contemplated by the city.

Subsequently, the incorporators, acting under sections 19 and 20 of the statute, agreed with the towns of Ludlow, Belcher-town and Palmer upon the routes of the railroad in those towns, and in October, 1911, the selectmen of these towns certified the routes agreed upon. The routes so fixed in these three towns were substantially the same as those shown with map accompanying the petition for a certificate of exigency.

On Sept. 30, 1910, the directors of the Hampden Railroad submitted to the aldermen of the city of Springfield the map and engineer's report which had been submitted to the Railroad Commissioners at the time of the filing of the petition for a cer-

tificate of exigency and, also, on September 30, petitioned the board of aldermen to agree with the directors upon the route and location of the tracks of the railroad in Springfield, under sections 19 and 20. The matter was laid upon the table on Oct. 10, 1910.

At a meeting of the aldermen of Springfield on April 3, 1911, the petition was taken from the files, and it was voted to give a hearing to all persons interested, on April 17. At this hearing Ralph D. Gillett appeared on behalf of the petitioner and stated that the plan of the corporation had been changed somewhat and that under the proposed plan the location asked for would not go through or across any land owned by the city of Springfield. A revised plan of the location was presented. No one appeared in opposition. The hearing was closed, and, on motion of Alderman Wight, it was voted that the location as prayed for be granted.

The city clerk of Springfield issued a certificate under date of April 17, 1911, as follows:—

I hereby certify that at a meeting of the board of aldermen of the city of Springfield, Commonwealth of Massachusetts, held April 17, 1911, after a hearing duly posted and advertised as required by law, it was voted in the matter of the petition of the Hampden Railroad for a location in the city of Springfield that said location be granted as prayed for.

Attest:

(Signed)

E. A. NEWELL,
City Clerk.

The new plan referred to in this vote showed the location in Springfield upon which the railroad has been actually constructed, but a location different from that shown upon the map filed with the Railroad Commissioners with the petition for a certificate of exigency.

Between the date when the original petition was filed with the aldermen of Springfield and the date when the new plan was finally acted upon, the New York Central Railroad, as lessee of the Boston & Albany Railroad, had made an agreement, in February, 1911, with the New York, New Haven & Hartford

Railroad that such through routes over the lines of the New Haven system and Boston & Albany Railroad should be established as the public interest might require. After this agreement, but before July, 1911, Mr. Mellen suggested the possibility of establishing a connection of the Hampden Railroad with the Boston & Albany at Athol Junction and of making arrangement for the use of the Boston & Albany tracks between Athol Junction and Springfield. The suggestion was favorably received but no actual and formal agreement concerning the subject was made until July 10, 1912, when an agreement was made between the New York Central and the Boston & Maine for the use of these tracks.

In the city of Chicopee the associates were unable to agree with the aldermen upon a route in that city, whereupon, acting under section 21, on Feb. 10, 1911, they petitioned the Board of Railroad Commissioners to fix the route. An order of notice was issued upon this petition, and, on June 2, 1911, the Board of Railroad Commissioners fixed the route of the Hampden Railroad in Chicopee.

No route was ever fixed in the city of Holyoke. A petition was, however, filed by the Hampden Railroad with the aldermen of Holyoke, dated Sept. 30, 1910, asking the Board to agree upon a route in Holyoke. This petition was referred to a committee Oct. 4, 1910, and no further action was ever taken upon it.

On May 8, 1911, the directors of the corporation petitioned the Board of Railroad Commissioners for a certificate of compliance, under section 24, which provides in substance that when it is shown to the satisfaction of the Railroad Commissioners that the requirements of the chapter preliminary to the incorporation of a railroad corporation have been complied with and that payment for all damages is adequately guaranteed, the clerk of the Board shall, on its order, annex to the agreement of association a certificate stating that such requirements have been complied with. This certificate was issued by the clerk upon order of the Board on June 2, 1911.

On the same date, the agreement of association, with its cer-

tificates annexed, was filed in the office of the Secretary of the Commonwealth, and a certificate of incorporation was issued in accordance with the provisions of section 24 of the statute.

The capital stock of the corporation as fixed in the agreement of association was \$1,000,000. On July 20, 1911, it was voted to increase the capital stock to \$1,400,000.

On Aug. 17, 1911, the corporation filed with the Board a petition for a certificate preliminary to location, under section 71 of the statute, and, on the same day, the clerk of the Board, by order of the Board, gave a certificate under this section.

On Dec. 5, 1912, the corporation petitioned the Board, under section 65 of the statute, to determine that capital stock to the amount of \$1,400,000 was reasonable and necessary for the construction and equipment of its railroad. On this petition an order of notice was issued by publication in the newspapers, and, on Dec. 13, 1912, the Board approved the issue of this stock to this amount at par, the proceeds "to be applied only toward the payment and capitalization, necessary cost of building and equipping its railroad, and the purchase of property necessary for its operation."

On Oct. 8, 1912, the corporation petitioned the Board, under section 78 of the statute and under St. 1912, c. 725, Part II., § 2, to prescribe the limits within which additional land for additional depot and station purposes, etc., might be taken by it within the city of Springfield, outside the limits of its route already fixed. Upon notice duly published, the Board, on Nov. 16, 1912, prescribed the limits as prayed for.

On June 3, 1913, the corporation filed its petition for a certificate preliminary to operation, under section 127 of the statute, and, on June 18, 1913, the Board certified that "all laws relative to the construction of the Hampden Railroad have been complied with, and that the railroad appears to be in safe condition for operation."

From the facts stated it appears that on June 2, 1911, the Board of Railroad Commissioners, the predecessor of the present Public Service Commission, certified, under St. 1906, c. 463, Part II., § 24, that the requirements of the chapter preliminary

to the incorporation of a railroad corporation under general laws had been complied with. Section 24 provides as follows:—

When it is shown to the satisfaction of the board of railroad commissioners that the requirements of this chapter preliminary to the incorporation of a railroad corporation have been complied with, . . . the clerk of said board, upon its order, shall annex to the agreement of association a certificate stating that such requirements have been complied with. The directors shall thereupon file the agreement of association, with all the certificates annexed thereto, in the office of the secretary of the commonwealth; who, upon the payment to him of a fee of fifty dollars, shall receive and preserve the same in form convenient for reference and open to public inspection, and shall thereupon issue a certificate of incorporation . . .

In my opinion it is clear from the provisions quoted that the Legislature intended that the Board of Railroad Commissioners should act as final arbiters upon the question whether the incorporators had complied with the requirements of the statute preliminary to incorporation, and that when that Board had certified that it had been shown to its satisfaction that the requirements of the law had been complied with, the Secretary of the Commonwealth, the incorporators, the investors and the public might rely upon the decision, and that all parties should be bound by the record.

It appears not to have been determined by the Supreme Judicial Court of this Commonwealth that the decision of the Board upon this point is subject to revision by the court on a question of law. In the case of *Kilty v. Railroad Commissioners*, 184 Mass. 310, at pages 311, 312, the court said:—

It is unnecessary to determine whether the decision of the Railroad Commissioners under the R. L., c. 111, § 46, upon the question whether the preliminary requirements of the chapter have been complied with is final, or is subject to revision by this court on questions of law.

The provisions of section 46 of chapter 111 of the Revised Laws are now incorporated in St. 1906, c. 463, Part II., § 24. No adjudication upon the point appears to have been made in any later case arising under the statute.

In the absence of an adjudication that the decision of the

Board upon this point is subject to revision by the Supreme Judicial Court in matters of law, it should not, in my opinion, be considered as subject to revision by any other tribunal. There is no occasion, therefore, to enter into a detailed discussion of all the provisions included within sections 13 to 28 and of the various things done for the purpose of complying therewith, and I do not construe the request of the commission as a request for revision of all these matters. It must, of course, be presumed in favor of the various decisions and certificates of the Board of Railroad Commissioners that, acting as a public Board, it has been fully satisfied that the incorporators, in all acts requiring the approval of the Board, have acted in good faith; that the rights of the public and all parties interested in the proceedings have been protected by the Board so far as the statutes permit such protection, and that the interests of the public have been served by the manner in which the requirements of the chapter preliminary to incorporation have been complied with.

An opinion upon the question "whether upon the facts stated the Hampden Railroad has kept within the powers conferred upon it by its charter and the laws of the Commonwealth" involves, however, a determination of what powers have been conferred upon the corporation, and the consideration of that question must of necessity involve some discussion of the requirements of the statute preliminary to incorporation and of the manner in which those requirements have been complied with.

The question is made difficult chiefly through the form in which the original agreement of association was drawn.

Section 13 of the statute requires that the agreement of association shall state these facts with reference to the proposed location of the railroad: —

- (c) The termini of the railroad.
- (d) The length of the railroad as nearly as may be.
- (e) The name of each county, city and town in which the railroad is to be located.
- (f) The gauge of the railroad.

The agreement of association in this case contained the following statements: —

The termini of the proposed road are the city of Springfield and the city of Holyoke on the west, and near the village of Bondsville in the town of Palmer on the east, all in said county of Hampden. . . .

The length of the railroad as nearly as may be determined is twenty-five miles.

The said railroad is located, as above indicated, in the cities of Springfield, Chicopee and Holyoke and in the towns of Ludlow and Palmer, all in the said county of Hampden, and in the town of Belchertown, in the county of Hampshire.

These facts with reference to the location of the proposed railroad were all that the statute required, but the agreement, after the statement quoted above with reference to termini, continues somewhat inartificially as follows:—

The road is more particularly described, as to termini, as follows:—

Commencing at a point in the city of Springfield, at or near the Connecticut River, north of Bridge Street, and extending thence northerly through the city of Springfield to the city of Chicopee, in said county, thence easterly through that part of Chicopee known as Chicopee Falls, thence crossing the Chicopee River and extending to and through the town of Ludlow, in said county, to the town of Belchertown, in the county of Hampshire, and in the said last mentioned town to a connection with a branch of the Boston & Albany Railroad known as the Athol Branch, and the New London Northern Railroad, and crossing the said branch of the Boston & Albany Railroad, and the said New London Northern Railroad, thence to a connection with the tracks of the Central Massachusetts division of the Boston & Maine Railroad at a point near the village of Bondsville, in said town of Palmer, together with an extension from a point in the indicated line in the city of Chicopee northwesterly through that portion of Chicopee known as Willimansett to the Connecticut River, thence across said river to and into said Holyoke.

It appears that although designated as a “more particular description as to termini,” this latter description is in fact not a description as to termini but of the route between the termini as contemplated by the associates at the date of the agreement of association.

Since the statute provides that, by agreement with municipal authorities or by order of the Board of Railroad Commissioners, the route proposed by the incorporators may be altered and the

location fixed anywhere within the limits of the city or town for which the respective municipal authorities are acting, it is evident that the Legislature did not contemplate the insertion in the agreement of association of a detailed description of a route, and such a description has no place in a carefully drawn agreement of association.

Section 24 prescribes the form for the certificate of incorporation, which includes a description of the railroad as in the agreement of association. It provides that the certificate of incorporation shall be signed by the Secretary of the Commonwealth and "shall have the force and effect of a special charter." This latter provision did not appear in the statutes regulating the incorporation of railroads under general laws until the enactment of St. 1906, c. 463, Part II. The form of the provision was undoubtedly copied from section 12 of the business corporation law (St. 1903, c. 437), and, if the same construction were to be given to the provision in this statute as is given to the provision as it occurs in the business corporation law, there might be a strong reason for holding that the Hampden Railroad Corporation had no authority to construct a railroad on a route other than that described in the agreement of association.

But in my opinion that provision cannot be so construed if proper effect is to be given to the other provisions of the railroad law.

Section 19 of the railroad statute provides that the directors shall submit to the board of aldermen of every city and to the selectmen of every town named in the agreement of association a map of the route as originally proposed. Section 20 provides that these boards of aldermen and selectmen may agree with the directors of the railroad "as to the said route or as to any route of the railroad in said city or town," and that such an agreement shall fix the route in the respective cities and towns. Section 21 provides that if the municipal authorities fail to agree with the directors, the Board of Railroad Commissioners may fix the route in the city or town. Section 23 requires the directors, clerk and treasurer of the corporation to certify that it is intended "in good faith to locate, construct, maintain and operate

the railroad *upon the route fixed.*" Section 24 requires the directors to file the certificates fixing the route, together with the agreement of association, in the office of the Secretary of the Commonwealth, and requires the Secretary of the Commonwealth to keep these certificates annexed to the agreement of association "in form convenient for reference and open to public inspection."

It is clear from these provisions that the powers conferred upon a corporation are not to be ascertained solely by inspection of the certificate of incorporation. They are conferred partly through certificates fixing the route, given under authority of sections 20 and 21 of the statute. These certificates are to be read with the certificate of incorporation, for the purpose of ascertaining upon what route the corporation is authorized to construct its railroad.

The jurisdiction of the aldermen of cities and of the selectmen of towns is, of course, confined to their respective cities and towns, but within these limits they are, under the terms of this statute, the guardians of the interests of their municipality and may agree upon the route as they see fit in their own municipality, provided only that the route is consistent with the description of the road required by law to be contained in the agreement of association, consisting of the statement of the termini, the approximate length of the road, and the counties, cities and towns through which it is to pass.

In my opinion the superfluous and inartificial description of the proposed route of the railroad is not to be construed either as abridging the rights of the municipal authorities to fix a route different from that so described or as depriving the incorporators of the rights acquired by stating in the agreement of association all that the statutes specifically required.

This view is confirmed by an examination of the provisions with reference to incorporation by special charter, which differ from those with reference to incorporation under general laws. Sections 11 and 12 provide, with reference to special charters, that the railroad shall be confined by the special charter within the limits indicated by the notice given upon its petition, and

that the route of the railroad established by special charter shall be fixed "according to the provisions of sections twenty and twenty-one *except so far as they may have been fixed by special statute.*" The language of these sections indicates that in this act, when the Legislature has meant to limit the exercise of the authority vested in the local boards, under sections 20 and 21, it has so limited it by apt provision.

In my opinion a fair construction of the statute requires me to conclude that the Legislature has left the matter of the route in an elastic form and has given to the municipal boards powers which amount to authority to amend the charter of the railroad in matters concerning the route, provided only they keep within the outside limits of the route stated in the agreement of association, namely, the termini, and the counties, cities and towns in which the road is located.

The provisions of section 76 also appear to confirm this view. That section provides that a railroad corporation, having taken land for its railroad, may vary the direction of said railroad in the city or town in which the land is situated, "but it shall not encroach any part thereof outside the limits of the route fixed under the provisions of sections twenty and twenty-one, *without the consent in writing of the board of aldermen or selectmen*, if it was fixed under the provisions of section twenty, or of the board of railroad commissioners, if it was fixed under the provisions of section twenty-one." Under the earlier provisions of law upon which this section is based the route could be varied only within the limits fixed by the act of incorporation. Under the present section the route may be varied not only from that originally proposed under authority of sections 20 and 21, but also from the route fixed under sections 20 and 21, by consent of the board of aldermen or selectmen in writing.

I am led to the conclusion, therefore, that the Hampden Railroad Corporation has the right, under its charter and the laws of the Commonwealth, to build its road upon the route shown to be fixed by the certificates annexed to the agreement of association, on file in the office of the Secretary of the Commonwealth; and the description of the route contained in the

agreement of association, so far as it is not required by law and is inconsistent with the route fixed under authority of sections 20 and 21, is, in my opinion, to be disregarded.

Among the acts stated as having been done by the corporation since the time when the commission certified that all requirements of the statutes preliminary to incorporation had been complied with, I find none which the corporation was not authorized to do by its charter and the laws of the Commonwealth.

EGGS — COLD STORAGE — SALE AT RETAIL UPON ORDER —
DELIVERY IN MARKED CONTAINER.

The provision of St. 1913, c. 538, § 1, that "whenever eggs that have been in cold storage are sold at retail, or offered or exposed for sale, the basket, box or other container in which the eggs are placed shall be marked plainly and conspicuously with the words 'cold storage eggs,'" requires that the basket, box or other container in which such eggs are placed when delivered by a retail dealer to a consumer, upon orders taken at the home of the consumer, or by telephone, where such consumer does not have an opportunity to see such eggs in a marked container at the store, shall be marked with the words "cold storage eggs."

To the
State Board
of Health.
1913
September 24.

You have requested my opinion upon the question whether the provisions of St. 1913, c. 538, require that the basket, box or other container in which eggs are placed when delivered by a retail dealer in eggs to a consumer, upon orders taken at the home of the consumer, or by telephone, or by any other method by which the consumer does not have an opportunity to see the eggs in a marked container in the store, shall be marked with the words "cold storage eggs."

St. 1913, c. 538, § 1, provides as follows: —

Whenever eggs that have been in cold storage are sold at retail, or offered or exposed for sale, the basket, box or other container in which the eggs are placed shall be marked plainly and conspicuously with the words "cold storage eggs", or there shall be attached to such container a placard or sign having on it the said words. If eggs that have been in cold storage are sold at retail or offered or exposed for sale without a container, or placed upon a counter or elsewhere, a sign or placard, having the words "cold storage eggs" plainly and conspicuously marked upon it, shall be displayed in, upon or immediately above the said eggs;

the intent of this act being that cold storage eggs sold at retail or offered or exposed for sale shall be designated in such a manner that the purchaser will know that they are cold storage eggs. The display of the words "cold storage eggs", as required by this act, shall be done in such manner as is approved by the state board of health.

For the purpose of preventing evasion of the requirements of the statute through divergent interpretations of its provisions, the Legislature expressly stated the intent of the law to be that cold storage eggs *sold or offered or exposed for sale* at retail should be designated in such manner as to give the purchaser notice of the fact that they are cold storage eggs. If a purchaser could not go to the store to make his purchase, obviously the expressed intent of the law would not be satisfied if the container in which the eggs were delivered were not marked in such manner as to give him notice. The construction which requires the container in which the eggs are delivered to the consumer so ordering the eggs to be marked with the words "cold storage eggs," is, therefore, not only demanded by the words of the first sentence of the section, which require not only that the container of eggs *which are offered or exposed for sale* but also the container of eggs *which are sold* shall be marked plainly and conspicuously, but it is also the only construction which gives effect to the clause stating the intent of the law.

BOARDS OF HEALTH — ARTICLES OF FOOD — SALE — RULES
AND REGULATIONS — STATE BOARD OF HEALTH — AP-
PROVAL — REGULATION OF SALE OF MILK.

The provision of St. 1912, c. 448, amending R. L., c. 56, § 70, that "boards of health . . . may make and enforce reasonable rules and regulations, subject to the approval of the state board of health, as to the conditions under which all articles of food may be kept for sale or exposed for sale, . . ." must be construed in connection with the original provision of section 70, that "boards of health . . . may inspect the carcasses of all slaughtered animals and all meat, fish, vegetables, produce, fruit or provisions of any kind found in their cities or towns" and "if, on such inspection, it is found that such carcasses or articles are tainted, diseased, corrupted, decayed, unwholesome or, from any cause, unfit for food, the board of health shall seize the same and cause it or them to be destroyed forthwith or disposed of otherwise than for food," and the application of the words "all articles of food" in the amendment must be limited to the articles of food enumerated in the original provision. It follows, therefore, that such provisions do not authorize the regulation of the sale of milk.

To the
State Board
of Health.
1913
September 29.

You have requested my opinion as to whether milk is to be considered an article of food affected by the provisions of chapter 448 of the Acts of 1912, and whether, therefore, any rules and regulations made concerning the sale of milk must not be duly advertised and submitted to the State Board of Health for its approval before being enforced.

Chapter 448 of the Acts of 1912 is an amendment of section 70 of chapter 56 of the Revised Laws, and said section as so amended reads as follows: —

Boards of health of cities and towns, by themselves, their officers or agents, may inspect the carcasses of all slaughtered animals and all meat, fish, vegetables, produce, fruit or provisions of any kind found in their cities or towns, and for such purpose may enter any building, enclosure or other place in which such carcasses or articles are stored, kept or exposed for sale. If, on such inspection, it is found that such carcasses or articles are tainted, diseased, corrupted, decayed, unwholesome or, from any cause, unfit for food, the board of health shall seize the same and cause it or them to be destroyed forthwith or disposed of otherwise than for food. All money received by the board of health for property disposed of as aforesaid shall, after deducting the expenses of said seizure, be paid to the owner of such property. If the board of health seizes or condemns any such carcass or meat for the reason that it is affected with a contagious disease, it shall immediately give notice to the board of

attle commissioners of the name of the owner or person in whose possession it was found, the nature of the disease and the disposition made of said meat or carcass.

Boards of health of cities and towns may make and enforce reasonable rules and regulations, subject to the approval of the state board of health, as to the conditions under which all articles of food may be kept for sale or exposed for sale, in order to prevent contamination thereof and injury to the public health. Before the board of health of any city or town submits such rules and regulations to the state board of health for approval it shall hold a public hearing thereon, of which notice shall be given by publication for two successive weeks, the first publication to be at least fourteen days prior to the date of the hearing, in a newspaper published in such city or town, or, if none is so published, in a newspaper published in the county in which such city or town is located. Any person affected by such rules and regulations, in the form in which they are presented to the state board of health for approval, may appeal to the said board for a further hearing, and said board shall not grant its approval to rules and regulations concerning which such an appeal has been taken until it has held a public hearing thereon, advertised in the manner specified above in this section with reference to hearings before boards of health in cities and towns.

In the original provisions of Revised Laws, chapter 56, the enactments concerning milk are contained in sections 51 to 69, inclusive. Section 70 comes under the heading "Meat and provisions," and is intended to cover other articles than milk.

In my opinion, although the words "all articles of food" are broad enough in a general sense to include milk, as used in this particular enactment, the intention is to limit the application of these words to the articles of food properly coming within the scope of the original section. I do not think its application is to be extended to apply to milk, and I therefore answer your inquiry in the negative.

SCHOOLS — ATTENDANCE — CHILDREN UNDER SIXTEEN YEARS
OF AGE — EMPLOYMENT CERTIFICATE — TRANSCRIPT OF
BIRTH CERTIFICATE — FEES.

The provision of St. 1913, c. 779, § 18, amending St. 1909, c. 514, § 60, as amended by St. 1910, c. 257, § 4, that "no fee shall be exacted for an employment certificate or for any of the papers required by this act," in connection with the employment of children under sixteen years of age, is not applicable to birth certificates or duly attested transcripts thereof made by registrars of vital statistics, city or town clerks, or other officers charged with the duty of recording births.

To the
Commissioner
of Labor.
1913
October 8.

On behalf of the State Board of Labor and Industries you have inquired whether or not the provisions of St. 1913, c. 779, § 18, amending St. 1909, c. 514, § 60, as previously amended by St. 1910, c. 257, § 4, that "no fee shall be exacted for an employment certificate or for any of the papers required by this act," is applicable to birth certificates or duly attested transcripts thereof made by registrars of vital statistics, city or town clerks, or other officers charged with the duty of recording births.

St. 1913, c. 779, § 1, provides that —

every child under sixteen years of age who has not received an employment certificate as provided in this act . . . shall attend a public day school . . .

Section 16, which amended St. 1909, c. 514, § 58, as amended by St. 1911, c. 269, by striking out said section and inserting among other things the following, provides: —

The person issuing employment certificates shall in each case, before issuing a certificate, receive, examine, approve and file the following papers, duly executed: —

(1) A pledge or promise signed by the employer or by an authorized manager or superintendent, setting forth the character of the employment, the number of hours per day during which the child is to be regularly employed, and the name and address of the employer, in which pledge or promise the employer agrees to employ the child in accordance with the provisions of this act, and to return the employment certificate as provided in section fifty-seven.

(2) The school record of such child, properly filled out and signed as hereinafter provided.

(3) A certificate signed by a school or family physician, or by a physician appointed by the school committee, stating that the child has been thoroughly examined by said physician and, in his opinion, is in sufficiently sound health and physically able to perform the work which the child intends to do.

(4) Evidence of age showing that the child is fourteen years of age, which shall consist of one of the following proofs of age:

(a) A birth certificate, or a duly attested transcript thereof, made by a registrar of vital statistics or other officer charged with the duty of recording births.

(b) A baptismal certificate, or a duly attested transcript thereof, showing the age and date of baptism of the child.

(c) In case none of the aforesaid proofs of age is obtainable, and only in such case, the person issuing employment certificates may accept in lieu thereof a passport or a duly attested immigration record, or transcript thereof, showing the age of the child: *provided*, that it shall appear to the satisfaction of said person that the same is good and sufficient evidence of the child's age.

(d) In case none of the aforesaid proofs of age is obtainable, and only in such case, the person issuing employment certificates may accept in lieu thereof a record of age as given on the register of the school which the child first attended in the commonwealth: *provided*, that such record was kept for at least two years during the time when such child attended school.

(e) In case none of the aforesaid proofs of age is obtainable, and only in such case, the person issuing employment certificates may receive the signed statement of the school physician, etc.

Said section 18 provides, in part, as follows:—

The employment certificate required by this act shall . . . certify that . . . all the papers required by section fifty-eight have been duly examined, approved and filed and that the conditions and requirements for issuing an employment certificate have been fulfilled. It shall state the grade last completed by said child. Every such certificate shall be signed in the presence of the person issuing the same by the child in whose name it is issued. It shall state the name of the employer for whom, and the nature of the employment in which, the certificate authorizes the child to be employed. It shall bear a number, show the date of its issue and shall be signed by the person issuing it. No fee shall be exacted for an employment certificate or for any of the papers required by this act. Duplicate employment certificates shall not be issued until it shall appear to the satisfaction of the person authorized to issue certificates that the original certificate has been lost. . . .

If the provision that "no fee shall be exacted for an employment certificate or for any of the papers required by this act" is to be construed broadly, it would probably apply to all of the papers required under the provision of section 16 above quoted, including the papers specified as sufficient evidence for showing that a child is fourteen years of age, if such papers can be said to be required; but, for the reasons hereafter stated, I am of opinion that it cannot be so broadly construed.

This provision with respect to fees obviously applies to all records and papers required by said section 60, as amended by section 18 of chapter 779, and would doubtless apply to certificates or other papers signed by officials connected with the schools of any city or town and required under any of the provisions of the act. It could not, however, apply either to the certificate of the family physician [see (3)], or to a baptismal certificate, or a duly attested transcript thereof [see (b) under (4)], or to a passport, or a duly attested immigration record, or a transcript thereof, or other official or religious record of a child's age [see (c) under (4)], relating to evidence of age, for the reason that the Legislature has no authority to compel a physician in private practice to perform gratuitous services or the keeper of private records to supply transcripts thereof without compensation. Neither has it the authority to forbid the Federal authorities to charge fees for copies of their records relating to immigration. The Legislature has authority to require the issuance of certificates by public officials, such as the birth certificates in question, or copies thereof, without compensation. This can easily be declared in unmistakable language, but it is not made plain in the present legislation. I am led to the conclusion that the exemption from fee does not apply to fees for certificates for which there is other existing authority.

Moreover, it may be doubted whether a certificate by a family physician is required in the provision under discussion, in the sense in which the word is used in section 18. It is only one of several alternatives, any one of which would satisfy the requirements, and the same is true of the evidences of age required

under paragraph (4). Each of the subheads, including that in which a birth certificate, or a duly attested transcript thereof, is to be found, is an alternative, and no one of them is specifically required.

While the question is not entirely free from doubt, I am led to the opinion that birth certificates, or transcripts thereof, are not required to be furnished without the fee now provided by law therefor, and that for this reason also your specific inquiry should be answered in the negative.

COMMONWEALTH — EMPLOYEES — RETIREMENT — HEAD OF
DEPARTMENT — CHAIRMAN OF BOARD OR COMMISSION.

The chairman of a board or commission, consisting of three or more members appointed by the Governor, with the consent of the Council, for terms of years and receiving salaries from the Commonwealth, is not the head of a department within the meaning of St. 1911, c. 532, § 3, par. (4), providing that "any member who reaches the age of sixty years and has been in the continuous service of the commonwealth for a period of fifteen years immediately preceding may retire or be retired by the board of retirement upon recommendation of the head of the department in which he is employed . . ."

You have requested my opinion upon a question which has arisen from the administration of the provisions of St. 1911, c. 532, entitled "An Act to establish a retirement system for the employees of the commonwealth."

To the
Board of
Retirement.
1913
October 20.

That statute, as amended by St. 1912, c. 363, defines "employees" as "permanent and regular employees in the direct service of the commonwealth or in the metropolitan district service, whose only or principal employment is in such service."

By section 3 of the act a retirement association is established and membership is made optional for all employees in the service of the Commonwealth on Jan. 1, 1912, and compulsory for persons under fifty-five years of age thereafter entering the service of the Commonwealth who were not entitled to a pension from the Commonwealth for any reason other than membership in the association.

Section 3 also provides in the paragraph numbered (4), as follows: —

Any member who reaches the age of sixty years and has been in the continuous service of the commonwealth for a period of fifteen years immediately preceding may retire or be retired by the board of retirement upon recommendation of the head of the department in which he is employed, and any member who reaches the age of seventy must so retire.

There are in the Commonwealth a number of commissions consisting of three or more members who were appointed by the Governor, with the consent of the Council, for terms of years and who receive salaries from the Commonwealth, — the chairman of the commission sometimes receiving a salary in excess of that received by the other members of the commission by virtue of being chairman. As persons on the pay roll of the Commonwealth, employed in the direct service of the Commonwealth, whose only or principal employment is in such service, certain members of such commissions become members of the retirement association organized under the provisions of section 3.

The question upon which you request my opinion is, whether the chairman of such a commission is to be considered, within the meaning of paragraph (4), above quoted, “the head of the department” in the sense that he can recommend the retirement of one of the other members of the commission of which he is chairman.

In my opinion the chairman of such a commission as those referred to is not, within the meaning of the provision quoted, “the head of the department.”

The members of such commissions are, in contemplation of law, equal in their jurisdiction and powers. The fact that the board is organized, for convenience in the transaction of business, with a chairman as presiding officer does not transform the board into a single-headed department and does not constitute the chairman head of the department in the sense that he may recommend the retirement of his fellow members of the commission.

AUTOMOBILES OWNED BY THE COMMONWEALTH — NEGLIGENCE
OF CHAUFFEUR IN THE EMPLOYMENT OF THE COMMON-
WEALTH — PERSONAL LIABILITY — MEMBERS OF BOARDS
OR COMMISSIONS.

Where an automobile is under the care and control of a state board or commission or the members thereof and is used by such commission or by its members or executive officers or agents, with the consent of the commission, for the purpose of traveling upon official business, such commission or members, officers or agents are not personally liable for injury caused by such automobile to persons or property through the negligent conduct of the chauffeur if such commission, members or officers or agents at the time of using such automobile are engaged in the proper performance of their official duties and are not themselves negligent or otherwise at fault in their direction of such chauffeur in such a manner as to contribute to the cause of the injury.

You have requested my opinion upon certain questions arising from the following facts as stated by you: —

To the
Metropolitan
Park
Commission.
1913
October 22.

The Metropolitan Park Commission has under its care and control an automobile used by the commission, or members thereof, or by the secretary or engineer with the consent of the commission, for the purpose of traveling on official business of the commission. Whenever the commission or members thereof, or the secretary or the engineer, travel in his automobile, the machine is driven by a chauffeur employed by the commission and paid out of its maintenance appropriation. In such cases the chauffeur is subject to the direction and control of the member or members of the commission, or of the secretary or engineer, as the case may be, for the time being, riding in the machine.

The questions submitted by you are as follows: —

(1) If the commission or any member thereof should be traveling on official business in said automobile, driven by such a chauffeur subject to the general direction of the commission or such member thereof, and, through the negligent conduct of the chauffeur, injury should be caused by such automobile to person or property, would the commission, or any member or members thereof, traveling as stated at the time, be personally liable for such injury?

(2) If the secretary or the engineer should be traveling on official business in said automobile, driven by such a chauffeur, subject to the general direction of the secretary or engineer, as the case might be, and, through the negligent conduct of such chauffeur, injury should be caused

by such automobile to person or property, would the secretary or engineer, traveling as stated, under the circumstances be personally liable for such injury?

I infer from the statement that the automobile mentioned is "under the care and control" of the commission, that it is an automobile paid for and owned by the Commonwealth. I understand also that the chauffeur is an employee of the Commonwealth whose salary is paid from the treasury of the Commonwealth.

My opinion upon your first question is that the commission or members thereof are not personally liable for injury caused by the Commonwealth's automobile to persons or property through the negligent conduct of the chauffeur if the commission or members thereof traveling at the time are engaged in the proper performance of their official duties and are not themselves negligent or otherwise at fault in their direction of the chauffeur in such a manner as to contribute to the cause of the injury.

My opinion upon your second question is that the secretary or engineer is not personally liable for injury caused by the Commonwealth's automobile to persons or property through the negligent conduct of the chauffeur if the secretary or engineer traveling at the time is engaged in the proper performance of his official duties and is not himself negligent or otherwise at fault in the direction of the chauffeur in such a manner as to contribute to the cause of the accident.

PHARMACY LAW — BUSINESS OF PHARMACY — DRY GOODS AND
 MERCANTILE CORPORATION — LEASE OF FLOOR SPACE TO
 REGISTERED PHARMACIST — OWNERSHIP OF STOCK IN
 TRADE.

Where a corporation organized to carry on a dry goods and mercantile business leases floor space to a registered pharmacist to conduct the business of pharmacy upon the condition that the leased premises shall be held by the lessee "for and during such time as he shall continue to run the drug store therein, yielding and paying therefor as rent such proportion of the gross profits arising from the operation, conduct and maintenance of said store as shall be agreed to between said lessor and said lessee," the lessor retaining the ownership of all stock in trade, and the only interest of the registered pharmacist being that of lessee, such corporation is engaged in retailing, compounding for sale or dispensing for medicinal purposes drugs and medicines, within the provisions of R. L., c. 76, § 18, as amended by St. 1913, c. 720, § 1, that "whoever, not being registered as aforesaid, retails, compounds for sale or dispenses for medicinal purposes drugs, medicines, chemicals or poisons, . . . shall be punished by a fine of not more than fifty dollars, . . ." and that "no unregistered co-partner or unregistered stockholder in a corporation doing a retail drug store business shall hereafter be actively engaged in the drug business," and, not being registered, is unlawfully engaged therein.

You have requested my opinion upon questions arising from the following facts as stated by you: —

To the
 Board of
 Registration in
 Pharmacy.
 1913
 October 27.

The Shepard Norwell Company, incorporated to do a dry goods and mercantile business, desires to do a drug business in the following manner, — to lease space in its place of business to a registered pharmacist under the accompanying form of lease, Shepard Norwell Company owning the stock in said space so leased, the registered pharmacist owning nothing. They desire said pharmacist to procure a sixth class license.

The form of lease submitted with this statement provides that the Shepard Norwell Company shall lease space in its Boston store to the lessee —

To have and to hold the same to the said lessee (but not to his executors, administrators or assigns) for and during such time as he shall continue to run the drug store therein.

Yielding and paying therefor as rent such proportion of the gross profits arising from the operation, conduct and maintenance of said store as shall be agreed to between said lessor and said lessee.

The lease also contains the following clauses:—

The lessee further covenants that he will not advertise said store, or the business therein conducted, except in such advertisements as shall first be approved by the lessor, and then only in connection with other advertisements of the lessor, or in such places, newspapers, periodicals and mediums as the lessor shall designate.

The lessee further covenants that he will as such lessee in the conduct of such drug store comply with such rules and regulations as to the management and upkeep thereon as the lessor shall lay down for the general guidance of its store conducted at the above number; and he will make no alterations in the leased premises without on each occasion first procuring the written consent of the lessor thereto; that the lessor and its agents and servants may at any time and from time to time enter and view the leased premises and make such repairs or alterations therein as shall be necessary.

The questions submitted by you are:—

1. Can the Board of Registration in Pharmacy recognize said drug store as being lawfully conducted?
2. Could a certificate for sixth class license be granted to the lessee of said space?

In my opinion both questions must be answered in the negative.

R. L., c. 76, § 14, as amended, requires that persons wishing to do business as pharmacists shall be examined and registered by the Board of Registration in Pharmacy. Section 18 of said chapter, as amended by St. 1913, c. 720, § 1, provides as follows:—

Whoever, not being registered as aforesaid, retails, compounds for sale or dispenses for medicinal purposes drugs, medicines, chemicals or poisons, except as provided in section twenty-three, shall be punished by a fine of not more than fifty dollars, but the provisions of this section shall not prohibit the employment of apprentices or assistants and the sale by them of any drugs, medicines, chemicals or poisons under the personal supervision of a registered pharmacist. No unregistered co-partner or unregistered stockholder in a corporation doing a retail drug business shall hereafter be actively engaged in the drug business. Every registered pharmacist carrying on the drug business as proprietor or a manager shall cause his name to appear on every sign indicating or advertising his place of business and on every label used for medicinal

preparations compounded in his place of business. The term "personal supervision" as used in the act shall mean that a registered pharmacist is in charge and present in the store.

In my opinion it is clear from an examination of the facts stated and of the terms of the lease submitted that the Shepard Norwell Company would, under such circumstances, be engaged in retailing, compounding for sale or dispensing for medicinal purposes drugs and medicines.

The fact that the terms upon which the person who is to have supervision of the drug business is employed take the form of a lease does not alter the essential fact that the business is owned and managed by the Shepard Norwell Company. Since that corporation is not registered in accordance with the provisions of law, its drug store could not be considered by the Board as being lawfully conducted.

Section 23 of chapter 100 of the Revised Laws, as amended by St. 1909, c. 261, authorizes the Board of Registration in Pharmacy to issue certificates to persons, stating that in the judgment of the Board they are proper persons to be intrusted with a sixth class license. Section 22 of the same chapter of the Revised Laws, as amended by St. 1913, c. 410, provides as follows: —

One or more licenses of the sixth class shall be granted annually by the licensing board of cities, or by the mayor and aldermen of cities having no such board, or by the selectmen of towns, to retail druggists and apothecaries who are registered pharmacists actively engaged in business on their own account, upon presentation to the licensing board of the certificate prescribed by the following section, if it appears that the applicant is a proper person to receive such license, and is not disqualified to receive it under the provisions of sections fifty-three and fifty-four. A registered pharmacist who owns stock of the actual value of at least five hundred dollars in a corporation which has been incorporated for the purpose of carrying on the drug business, and who conducts in person the business of a store of such corporation, shall be considered as actively engaged in business on his own account and is qualified to receive a license for such store.

In my opinion upon the facts stated the lessee of the Shepard Norwell Company cannot be considered to be a registered phar-

macist "actively engaged in business on his own account," and so to be qualified to receive such a license.

The fact that a drug business cannot lawfully be carried on under such circumstances as appear in this case, under existing law, appears to have been recognized by the Legislature in the enactment of St. 1913, c. 705, entitled "An Act to provide for registering and licensing stores for transacting retail drug business." That act provides that the Board of Registration in Pharmacy may issue permits to keep open stores for the transaction of a retail drug business to such persons, firms and corporations as the Board may deem qualified to conduct such a store. Since, however, this act by its terms does not take effect until the first day of January, 1914, its only bearing upon the questions presented is to confirm the view above expressed, that under existing law such a drug store would not be lawfully conducted.

COMMONWEALTH — LAND AND BUILDINGS BELONGING TO STATE
HOSPITAL — TRUSTEES — EXCLUSION OF PUBLIC FROM USE
OF LAND.

The Board of Trustees of the Worcester State Hospital have the right to prevent persons from entering upon the property of the Commonwealth devoted to the purposes of such hospital for any purpose for which such persons are not authorized by law to enter upon the premises, and if, in the judgment of such trustees, it is for the best interest of such institution that the public, unless entering for certain specified purposes, should be excluded from the land and buildings belonging thereto, they are authorized to exclude it.

To the
Trustees of the
Worcester
State Hospital.
1913
November 1.

You have requested my opinion as to certain rights and duties of your Board. The questions submitted by you are as follows: —

1. Have we the right to prevent people coming on property of the Commonwealth used for the care of the State's wards?

2. If we have the right, is it our duty to prevent persons who come on for the purpose of getting, or being on the premises on legitimate business avail themselves of the opportunity to get, photographs of patients who happen to be outdoors?

In my opinion you clearly have the right as matter of law to prevent people from coming on the property of the Commonwealth devoted to the uses of the institution for any purposes for which they are not authorized by law to enter upon the premises.

The mere fact that the land and buildings of the institution are owned by the Commonwealth does not give to the general public the same rights which they have in a public park or common or recreation grounds.

The lands and buildings of the institution have been set apart by the Legislature representing the public for a certain specific use, — the care of the insane. Under the statutes of the Commonwealth the trustees of each institution for the insane have charge of the general interests thereof and are vested with the government of the institution. If, in the judgment of the trustees, acting reasonably and in good faith, it is for the best interests of the institution and the inmates thereof that people should be excluded from the land and buildings of the institution unless entering for certain defined purposes, the trustees are not only authorized by law to exclude them but are bound in the proper performance of their duties to exclude them.

Your second question, so far as it is a question as to your rights, is answered by the reply to the first. Whether it is your duty to prevent the taking of photographs of patients who happen to be out of doors on the premises of the institution, is rather a question of policy than a question of law and is, therefore, not strictly one upon which it is my official duty to advise.

In my opinion upon this question will be of any assistance to you, however, I have no objection to stating that in my opinion a court would hold unreasonable a regulation by the trustees, and the public at large would not consider unjustified such action to prevent photographs being taken for exhibition in the public press or other purposes of those who are so unfortunate as to be suffering from disordered minds, to the distress of their relatives and friends.

INSURANCE — TITLE INSURANCE — GUARANTY FUND — INVEST-
MENT — MORTGAGES — STOCK IN TRADE — TRADING
CAPITAL.

A title insurance company organized under the laws of this Commonwealth may not use as ordinary trading capital the guaranty fund which is required to be created and maintained by St. 1907, c. 576, § 64, providing that every such corporation shall set apart and invest as a trust for the benefit of its policy holders not less than two-fifths of its capital to be applied only to the payment of losses and expenses incurred by reason of the guaranty or insurance contracts of the corporation and may not use as stock in trade the mortgages in which such fund is invested.

To the
Insurance
Commissioner.
1913
November 21.

You have requested my opinion upon the question whether a title insurance company organized under the laws of this Commonwealth may trade in the mortgages in which its guaranty fund is invested, for the purpose of obtaining capital to carry on its business.

The guaranty fund of a domestic title insurance company is required to be created and maintained under St. 1907, c. 576, § 64, which provides as follows:—

Every such corporation shall set apart an amount not less than two fifths of its capital, and not less than one hundred thousand dollars in any case, as a guaranty fund, and shall invest it subject to the same limitations as are imposed upon the investment of the capital of domestic insurance companies, and shall issue no policy and make no contract of guaranty or insurance until such amount is so set apart and invested.

The principal of such guaranty fund shall be a trust for the protection of policy holders, and shall be applied only to the payment of losses and expenses incurred by reason of the guaranty or insurance contracts of the corporation. Whenever the corporation shall increase its capital two fifths or a sufficient part of the increase shall be set apart and duly invested and added to the guaranty fund so that such fund shall always be not less in amount than two fifths of the entire capital.

If, by reason of losses or other cause, the guaranty fund is less than two fifths of the capital, the company shall make no further contract of guaranty or insurance until the fund is made good.

Section 37 of the same chapter, regulating the investment of the capital of domestic insurance companies, provides, in paragraph numbered 4, that the capital of such companies may be invested in loans upon improved and unincumbered real prop-

erty in any State of the United States, provided that no loan on such property shall exceed 60 per cent. of its market value, and that fact shall be properly certified.

According to the statement of facts contained in your letter, the title insurance company in question has a guaranty fund of the amount required by law, which is invested in mortgages of \$6,000 or less, and I infer from your letter and the oral statement accompanying it that the requirements of section 37 have been complied with, so that the investment is lawful in character.

In my opinion the company may not properly use its guaranty fund for trading purposes. The language of section 64, above quoted, is clear and unequivocal in the expression of the legislative intent that the fund shall not be used as ordinary trading capital and that the mortgages in which the fund is invested shall not be used as stock in trade.

The statute provides that the company shall "set apart" a certain fund for guaranty purposes, thus segregating it from its active funds. It provides that the fund shall be "invested" subject to certain limitations, implying a permanency of investment inconsistent with speculative and active trading and that the principal of such guaranty fund shall be a trust for the protection of policy holders," and limits the application of the fund to the payment of losses and expenses incurred by reason of the guaranty or insurance contracts of the corporation, and it carefully guards the integrity of the fund.

The corporation is, of course, not to be considered as prevented by these provisions from making such changes in the mortgages in which the guaranty fund is invested as the interests of the beneficiaries of that fund may require. It is not only authorized but is required by these provisions to make changes in the investment if it is necessary to do so to prevent impairment of the security afforded by the fund. The essential point is that the statute requires that this fund shall be set apart as a trust fund for purposes of protection, and that it shall be administered in accordance with the character given it by the statute and not as active trading capital. See 1 Op. Atty.-Gen. 41.

OPINIONS

OF

THOMAS J. BOYNTON, ATTORNEY-GENERAL.

SURGERY — UNAUTHORIZED OPERATIONS, WHEN PERMITTED.

A surgical operation which is immediately necessary for the preservation of life or health may be performed without the consent of the patient if it is impracticable to secure such consent or the consent of any one authorized to speak for him.

To the Superintendent of the
Worcester State
Asylum.
1914
January 26.

In response to your inquiry in regard to a surgical operation upon an inmate of your hospital, I have to say that there is, as you are doubtless well aware, a well settled rule of law that in all cases where a patient is in full possession of his faculties and able to consult about his condition, his consent is a necessary prerequisite to a surgical operation by his physician. In cases where an emergency arises calling for immediate action for the preservation of life or health of the patient, and it is impracticable to obtain his consent or the consent of any one authorized to speak for him, it is the duty of the physician to perform such operation as good surgery demands without such consent. The only case that will justify surgical operation without consent is "necessity for immediate action for the preservation of life or health." It does not seem to me that the case you state falls within this class, and, in my opinion, you should not operate without the consent of a legally appointed guardian.

DISTRICT POLICE — TRANSFER TO BOARD OF LABOR AND INDUSTRIES — RETRANSFER.

St. 1913, c. 610, § 1, providing for appointment by the Governor in case of vacancies in the two inspection departments of the District Police, did not repeal St. 1913, c. 424, § 1, permitting inspectors of factories and public buildings of the District Police who were transferred to the State Board of Labor and Industries from being transferred to the building department of the District Police to fill vacancies, upon their request.

You ask my opinion as to whether the provisions of section 1 of chapter 610 of the Acts of 1913 repeal that part of section of chapter 424 of the Acts of 1913 which relates to the transfer of certain inspectors from the service of the State Board of Labor and Industries to the building department of the District Police.

To the Chief
of the Massa-
chusetts Dis-
trict Police.
1914
January 28.

That part of section 1 of chapter 424 of the Acts of 1913 to which you refer reads as follows: —

The inspectors of factories and public buildings of the district police who were transferred to the state board of labor and industries, established by chapter seven hundred and twenty-six of the acts of the year nineteen hundred and twelve, shall, upon their request in writing to the governor, be transferred to the building department of the district police to fill any vacancies in that department which may occur after the first day of June in the year nineteen hundred and thirteen.

This act was approved April 2, 1913, and took effect upon its passage. That part of said section 1 of chapter 610 of the Acts of 1913 relating to appointments to the two inspection departments of the District Police reads as follows: —

All future vacancies in either of the two departments established by this act shall be filled by the governor, subject to existing laws governing the appointment of the chief, deputy chiefs and members of the detective and inspection departments of the district police, by appointment to the department in which the vacancy occurs.

The last-mentioned act was approved May 8, 1913, and also took effect upon its passage. That the Legislature had in mind the provisions of chapter 424 when chapter 610 was enacted was evidenced by the fact that appointments to be made

under the provisions of chapter 610 are to be made "subject to existing laws governing the appointment of the chief, deputy chiefs and members of the detective and inspection departments of the district police."

These words clearly indicate that the Legislature did not intend to change chapter 424 in so far as it affected the rights of those inspectors who might desire, upon their written request to the Governor, to be transferred to the building inspection department of the District Police.

In case a vacancy occurs in the building department of the District Police, as suggested in your letter, the Governor may make an appointment in accordance with the provisions of chapter 610 of the Acts of 1913, but subject, however, to the right of any one who has been an inspector of factories and public buildings of the District Police and has been transferred to the State Board of Labor and Industries, upon his request in writing to the Governor, to be appointed to fill such vacancy.

It is my opinion that section 1 of chapter 610 of the Acts of 1913 does not repeal that part of section 1 of chapter 424 of the Acts of 1913 hereinbefore quoted.

EMPLOYMENT OF MINORS — EMPLOYMENT OF WOMEN — STENOGRAPHERS AND BOOKKEEPERS.

Minors who are employed as bookkeepers, stenographers, clerks or clerical assistants are within the provisions of St. 1913, c. 831, regulating the labor of minors.

The law relative to the employment of women as stenographers, bookkeepers and in similar clerical positions was not changed by St. 1913, c. 758.

To the
Commissioner
of Labor.
1914
January 28.

Referring to your inquiry under date of Oct. 8, 1913, I understand your first question to be: Are minors who are employed as bookkeepers, stenographers, clerks or clerical assistants within the provisions of chapter 831 of the Acts of 1913?

The words of limitation and prohibition in the various sections of chapter 831 are, "no minor . . . shall be employed or permitted to work," and the construction of the statute depends upon the scope of the words "employed or permitted to work."

The word "employed" has been defined as "the act of doing a thing and being under contract or orders to do it." *United States v. Morris*, 14 Peters, 464, 475. The word may be further defined as, "involved in action of body or mind; kept in service."

The word "work" may fairly be said to be a generic term that includes every kind of human employment.

The manifest purpose of this statute is to limit carefully the hours of employment of minors and to protect them from the dangers, physical and moral, of certain occupations named herein. It is my opinion that minors who are within the ages specified in the various sections of this chapter and are employed as bookkeepers, stenographers, clerks or clerical assistants are within the provisions of this statute.

Your second question, as I understand it, is: Did the enactment of chapter 758 of the Acts of 1913 make any change in the law in regard to the hours of employment of women as stenographers, bookkeepers or in other similar clerical positions?

As suggested in your letter of inquiry, the controlling and descriptive words in the later statute, "employed in laboring," are the same as those used in the earlier one, so that in this important particular there is no change. It is my opinion that the law as to the employment of women who are above the age of twenty-one years as stenographers, bookkeepers and in other similar clerical positions was not changed by the enactment of chapter 758 of the Acts of 1913.

CONSTITUTIONAL LAW — GOVERNOR — COMMUTATION OF LIFE SENTENCE.

The Governor has constitutional authority, with the advice of the Council, to commute sentences of life imprisonment to imprisonment for a term of years.

You request my opinion upon the following question: "Have you, under the laws of this Commonwealth, the power or right to carry out a recommendation of the Parole Board, the Advisory

To the
Governor.
1914
January 28.

Board of Pardons, which Board after investigation recommends as follows: that the Governor now commute a sentence from imprisonment for life to imprisonment for the term of twenty years."

The pardoning power is conferred upon the Executive by the Constitution of the Commonwealth. Article VIII, section I, chapter II of part the second of the Constitution provides that—

The power of pardoning offences, except such as persons may be convicted of before the senate by an impeachment of the house, shall be in the governor, by and with the advice of council.

The words "the power of pardoning offences" are comprehensive. They include not only that absolute release from the penalty which is commonly referred to as a pardon, but those lesser exercises of clemency which are described as conditional pardon, commutation of sentence and respite of sentence. The only authority for the executive department of the government to mitigate or release from sentence for crime is this language of the Constitution. The Governor is clothed with authority to act in that respect only "by and with the advice of council." The unmistakable meaning of these words is that he can act only in conformity with the advice of the Council. He may decline to take action although the Council advise him to do so. Responsibility for granting a pardon rests upon the Governor and he cannot be compelled to take such action by the Council. The granting of a full or a partial pardon is the result of concurrent action by both the Governor and Council. Neither alone can take effective action. Both must agree before the Constitution is satisfied. The same principle applies whether the act be a complete or a modified pardon. A commutation of sentence, which is the substitution of a lighter for a more severe punishment, is an exercise of the pardoning power and must be in accordance with the Constitution. It is an act of the Governor which becomes effective only when concurred in by the Council. See *Opinion of the Justices*, 14 Mass. 472 *Opinion of the Justices*, 210 Mass. 610. "The commutation of a sentence is a pardon upon condition that the convict volun-

arily submits to a lighter punishment." *Opinion of the Justices*, 90 Mass. 616, 621.

It is my opinion, therefore, that the Governor may, with the advice of the Council, commute the sentence of a prisoner from life imprisonment to a term sentence, the commutation to become effective if petitioned for by the prisoner or accepted by him.

ENGINEERS — FIREMEN — SPECIAL LICENSE — EMPLOYMENT — VACATIONS.

Under St. 1911, c. 562, § 8, a special license issued to an engineer or fireman before the passage of the act becomes null and void whenever the holder ceases to be employed on the plant specified in said license.

Under this section the words "ceases to be employed" mean a complete severance from one's employment, and not absences on account of a vacation, illness or leave of absence.

You request my opinion upon certain questions based upon section 8 of chapter 562 of the Acts of 1911, which provides as follows: —

To the Chief
of the Massa-
chusetts Dis-
trict Police.
1914
January 28.

This act shall take effect on the first day of January in the year nineteen hundred and twelve, and a license in force on the first day of January in the year nineteen hundred and twelve shall continue in force until it is suspended or revoked for the incompetence or untrustworthiness of the licensee, *except that a special license shall not continue in force after the holder thereof ceases to be employed on the plant specified in the license.* A license in force on the first day of January in the year nineteen hundred and twelve may be exchanged for a license of the same class under this act at any time thereafter, on application to the boiler inspection department of the district police, upon forms to be furnished by said department. The applicant shall make oath to the statements contained in the said application, and the members of the boiler inspection department of the district police are hereby authorized to administer the oath.

Your questions are —

First. — A man was granted a special license in 1910, before the enactment of section 2 of chapter 562, Acts of 1911, which amended section 8 of chapter 102 of the Revised Laws by striking out the entire section and inserting a new section in place thereof, part of which reads as shown in italics above. The question now arises whether such licensee, having been licensed prior to the enactment of section 2, chapter 562, Acts of

1911, comes within the provisions of this clause; that is to say, whether such license continues in force if he should cease to be employed on the plant specified thereon, the license having been granted prior to such amendment.

Second. — Under the provisions of the statutes, prior to Jan. 1, 1912, it was necessary that an engineer's or fireman's license should be renewed every three years; but, under the provisions of the statute above quoted, a license in force on the first day of January, 1912, continued in force, and, therefore, does not have to be renewed. By the same provisions a licensee could exchange such license for a new license if he so desired. In the event of your deciding the first inquiry in the affirmative, would the fact of such man having exchanged such license bring him fully within the provisions of the statute above quoted?

Third. — If such licensee does come within the provisions of the statute above quoted, so far as relates to the license continuing in force only so long as he shall continue to be employed on the plant specified in the license, would the fact of his having been granted a leave of absence extending for a period of six months or more for the purpose of visiting in Europe, be considered as his having ceased to be employed on the plant specified in the license, although his name was retained on the roll of employees and he was again employed on the plant specified immediately upon his return to this country?

Referring to your first question, when the Legislature enacted section 8 above quoted and provided that "a license in force on the first day of January in the year nineteen hundred and twelve shall continue in force until it is suspended or revoked for the incompetence or untrustworthiness of the licensee," it is very clearly and evidently intended to, and did, make an exception in regard to special licenses by following the language last above quoted with these words: "*except that a special license shall not continue in force after the holder thereof ceases to be employed on the plant specified in the license.*"

It is my opinion that a special license issued before the enactment of chapter 562 of the Acts of 1911 becomes null and void whenever the holder of it ceases to be employed on the plant specified therein.

The answer to your second question is included in the answer to your first, and I assume that, as the answer to your first question is negative, no further answer is required.

Taking up your third question, I have to say that the words "ceases to be employed," as used in the statute above quoted with reference to the holder of a special license, mean a complete severance from his employment. An employee who is absent from the plant where he is employed on a vacation, on account of illness or on leave of absence, even for a period of six months, his name being retained on the roll of employees, has not, in my opinion, ceased to be employed in the sense intended by the statute, and his license, therefore, remains in force.

AGRICULTURAL SOCIETIES.

Under R. L., c. 124, § 1, providing that certain agricultural societies may receive bounties from the Commonwealth if not within twelve miles from the grounds of another such society, the distances should be computed on the way of travel from one point to another.

Under date of January 28, you have written me as follows: —

Referring to section 1 of chapter 124 of the Revised Laws, as amended by chapter 133 of the Acts of the year 1909, the State Board of Agriculture hereby requests your opinion as to whether, in line 6 and again in line 25 of said section, the distance of twelve miles should be interpreted to mean a straight line or by the shortest highway between the two points in question.

To the State
Board of
Agriculture.
1914
January 29.

The statute in question provides that —

Every incorporated agricultural society which was entitled to bounty from this commonwealth before the twenty-fifth day of May in the year eighteen hundred and sixty-six, and every other such society whose exhibition grounds and buildings are not within twelve miles of those of a society which was then entitled to bounty

may under certain conditions receive a bounty from the commonwealth.

The obvious purpose in establishing the twelve-mile limit was to prevent the growth of too many societies in the same locality, with the consequent division of effort. No good public purpose could be served by construing this limit as a bee-line limit. What possible objection could there be to the existence of two

societies ten miles apart in a bee-line through impassable mountains, although one hundred miles apart by road! The statute evidently contemplates twelve miles of farmer's travel, the case being analogous to that of a statute or court rule providing that depositions may be taken of witnesses living more than a certain number of miles from court, which statutes and rules obviously contemplate the distance that the witness would have to travel. See *Jennings v. Menaugh*, 118 Fed. 612, and cases cited.

Our Supreme Judicial Court has held that in the case of a statute which prohibits the granting of a liquor license for "any building or place on the same street within four hundred feet of any building occupied in whole or in part as a public school," "the four hundred feet between them are to be determined by measuring the nearest point of each house to the other." *Commonwealth v. Jones*, 142 Mass. 573, 576.

This decision may, however, be differentiated. The four hundred feet restriction is either purely arbitrary or, at most, is based on a general consideration of the concomitants of proximity, including sight, smell, noise and the general effect on neighborhood, as well as mere accessibility. But no consideration except that of accessibility can well be the reason for long limit, such as the twelve-mile distance in the statute in question.

It is my opinion, therefore, that the twelve-mile distance in chapter 133 of the Acts of 1909 is to be computed on the way of travel from one point to the other.

CONSTITUTIONAL LAW — JUSTICE OF THE PEACE — NOTARY PUBLIC.

An act providing that "all members of the Massachusetts bar are hereby made justices of the peace and notaries public" would be unconstitutional.

To the
Committee on
Legal Affairs.
1914
January 31.

You have requested my opinion as to whether House Bill No. 515, if enacted, would be constitutional. This bill is in the following terms: —

SECTION 1. All members of the Massachusetts bar are hereby made justices of the peace and notaries public, with all the privileges, powers and duties belonging to said offices.

SECTION 2. A certificate from the clerk of the supreme court, who all keep a record of such members, shall be proof that the person mentioned therein is such a member and a justice of the peace and notary public.

SECTION 3. This act shall take effect upon its passage.

“By the Constitution of the Commonwealth the office of justice of the peace is a judicial office.” *Opinion of the Justices*, 7 Mass. 604.

Article IX of section I of chapter II of part the second of the Constitution provides, in part, that —

All judicial officers . . . shall be nominated and appointed by the governor, by and with the advice and consent of the council.

Article III of chapter III of part the second of the Constitution provides as follows: —

In order that the people may not suffer from the long continuance in office of any justice of the peace who shall fail of discharging the important duties of his office with ability or fidelity, all commissions of justices of the peace shall expire and become void, in the term of seven years from their respective dates; and, upon the expiration of any commission, the same may, if necessary, be renewed, or another person appointed, as shall most conduce to the well-being of the commonwealth.

As to the appointment of notaries public, the fourth amendment to the Constitution provides that —

Notaries public shall be appointed by the governor in the same manner as judicial officers are appointed, and shall hold their offices during seven years, unless sooner removed by the governor, with the consent of the council, upon the address of both houses of the legislature.

In view of the provisions of the Constitution above quoted, I have to advise you that in my opinion this bill, if enacted, would be unconstitutional.

PUBLIC RECORDS — ILLEGITIMATE CHILDREN.

Under R. L., c. 29, § 1, par. 2, it is unlawful for a city or town clerk to use the term "illegitimate" in the record of a birth of a child unless the illegitimacy has been legally determined or admitted by the sworn statement of both the father and mother of the child.

To the Com-
missioner of
Public Records.
1914
February 2.

You request my opinion in regard to the record of the birth of a child to an unmarried woman.

The statute dealing with the subject of registration of births (R. L., c. 29, § 1, par. 2) is as follows: —

In the record of births, the date of the record, the date of birth, the place of birth, the name of the child, the sex and color of the child, the names and places of birth of the parents, including the maiden name of the mother, the occupation of the father, and the residence of the parents. In the record of the birth of an illegitimate child the name of, and other facts relating to, the father shall not be recorded except at the request in writing of both father and mother. The term "illegitimate" shall not be used in the record of a birth unless the illegitimacy has been legally determined, or has been admitted by the sworn statement of both the father and mother.

I note that the town clerk in his letter to you writes: "Now as a matter of fact this child is illegitimate and must be so recorded." I respectfully suggest that you call his attention to the fact that he is forbidden by the statute to use the term "illegitimate" in the record unless the illegitimacy has been legally determined or has been admitted by the sworn statement of both the father and mother. I advise that the town clerk expunge the erroneous record already made, making the expunging a matter of record, and that he then make a record of the birth of the child in accordance with the provisions of the statute.

CIVIL SERVICE — SEALER OF WEIGHTS AND MEASURES.

L., c. 62, § 18, is not repealed by St. 1909, c. 382, in so far as that section requires the annual appointment of sealers and deputy sealers of weights and measures in cities and towns of over ten thousand inhabitants; and although such sealers and their deputies are protected by civil service laws from being lowered in rank or compensation or removal from office, their term of office is not extended.

You request my opinion upon the following questions, to it:—

To the Commissioner of
Weights and
Measures.
1914
February 5.

1. Does section 2 of chapter 382 of the Acts of the year 1909 have the effect of repealing section 18 of chapter 62 of the Revised Laws in so far that section requires annual appointment of sealers and deputy sealers of weights and measures in cities and towns of over ten thousand inhabitants, who are included in the classified civil service by the provisions of said chapter 382 of the Acts of 1909?
2. Are sealers and deputy sealers in cities and towns of over ten thousand inhabitants protected by existing laws in reference to civil service, so that they shall be retained in office during good behavior, regardless of a change of municipal administration?

Chapter 382 of the Acts of 1909 is as follows:—

SECTION 1. The civil service commissioners may prepare rules, which shall take effect when approved by the governor and council in the manner provided by law, for including within the classified civil service all principal or assistant sealers of weights and measures holding office by appointment under any city or any town of over ten thousand inhabitants, whether such officers are heads of principal departments or not, and also including within the said service the inspectors of weights and measures of the commonwealth.

SECTION 2. All acts and parts of acts inconsistent herewith are hereby repealed.

Section 18 of chapter 62 of the Revised Laws, to which you refer, provides as follows:—

The mayor and aldermen of cities and the selectmen of towns shall annually, in March or April, appoint one or more sealers of weights and measures, or one sealer and one or more deputy sealers to act under the direction of the sealer, and they may also appoint gaugers of liquid measures; and may at any time remove such sealers, deputy sealers and gaugers, and appoint others in their places.

Section 18 not being expressly repealed by chapter 382 of the Acts of 1909 in the particulars to which you refer, the question arises as to whether it has been repealed by other legislation, and as to whether it was repealed by that chapter by implication.

Looking to other legislation, we find that the Legislature of 1904, by chapter 314, enacted that —

Every person holding office or employment in the public service of the Commonwealth or in any county, city or town thereof, classified under the civil service rules of the Commonwealth, shall hold such office or employment and shall not be removed therefrom, lowered in rank or compensation, or suspended, or, without his consent, transferred from such office or employment to any other except for just cause and for reasons specifically given in writing.

After the passage of this act the cases of *Smith v. Mayor of Haverhill*, 187 Mass. 323, and of *Lahar v. Eldridge*, 190 Mass. 504, were passed upon by the Supreme Judicial Court, and it was held that this statute did not extend the term of an officer appointed for a specified number of years but related to the removal, lowering in rank or compensation, suspension or transfer of such an officer within the term for which he had been appointed. In the first-mentioned case the court said: —

Any other construction would enlarge an appointment for a term of years into a life tenure, provided it was a classified office under the civil service rules.

This ruling left police officers in many cities in the Commonwealth to be appointed annually or for some other stated term. To remedy this condition of affairs as to police officers chapter 210 of the Acts of 1906 was enacted, providing in substance that police officers shall hold office during good behavior; but the operation of that act is limited to police officers. No similar legislation has been enacted in regard to sealers of weights and measures and their assistants or deputies or in regard to inspectors.

By section 1 of chapter 624 of the Acts of 1911 it is provided that —

Every person now holding or hereafter appointed to an office classified under the civil service rules of the commonwealth, . . . whether appointed for a definite or stated term, or otherwise, who is removed therefrom, lowered in rank or compensation, or suspended, or, without his consent, transferred from such office or employment to any other, may . . . bring a petition in the police, district or municipal court, etc.

This statute clearly recognizes the fact that appointments in the classified civil service may be made for a definite or stated term.

Coming to the question as to whether section 18 of chapter 62 of the Revised Laws was repealed by implication by chapter 382 of the Acts of 1909, we find that chapter 382 makes no provision whatever as to the time when or the term for which appointments shall be made. It is clear that the provisions of section 18 of chapter 62 of the Revised Laws, to the effect that "the mayor and aldermen of cities and the selectmen of towns shall annually, in March or April, appoint one or more sealers of weights and measures," etc., are not inconsistent with the provisions of chapter 382 of the Acts of 1909, and therefore remain in force. I am of the opinion that section 2 of chapter 382 of the Acts of 1909 does not have the effect of repealing section 18 of chapter 62 of the Revised Laws in so far as that section requires annual appointment of sealers and deputy sealers of weights and measures in cities and towns of over ten thousand inhabitants, who are included in the classified civil service by the provisions of said chapter 382 of the Acts of 1909.

In reply to your second question I have to say that in my opinion sealers of weights and measures and their deputies in cities of over ten thousand inhabitants are protected by existing civil service laws from being lowered in rank or compensation or removed from office during the term for which they have been appointed, but, as I have already indicated, in my opinion their term of office is not extended by reason of the provisions of chapter 382 of the Acts of the year 1909.

CORPORATIONS — CONTRACTS — TYPEWRITTEN SIGNATURE —
TESTS OF SAMPLES.

A typewritten signature by a duly authorized agent of a corporation to a proposal for a contract is valid.

In case of doubt in the construction of a contract, reference may be had to the specifications as an aid in ascertaining the intention of the parties.

Where a contract for the sale of coal of a certain grade provides that samples "will be taken until the total quantity amounts to about 1,000 pounds and shall represent not more than 500 tons of coal," and the samples are thus taken on deliveries of any part of 500 tons, if the coal thus tested is below the standard, penalties may be exacted as the contract provides.

Where penalties are exacted under a contract for the sale of coal, of 1 per cent in price for every 1 per cent. below the Thermal Unit analysis specified the per cent. (including fractions) of price decrease exactly equaling the per cent. of deficiency must be calculated.

To the
Superintendent
of the Worcester
State Hospital.
1914
February 6.

You have requested my advice upon certain questions that have arisen in regard to a contract entered into on the twenty eighth day of May, 1913, by the Commonwealth of Massachusetts, acting by the trustees of your institution, party of the first part, and the People's Coal Company of Worcester, party of the second part, in regard to the purchase of a quantity of coal by the Commonwealth from the People's Coal Company and for the sale and delivery of said coal to the Commonwealth by said company.

You ask first: "Is this proposal, having only typewritten signatures, legal?"

Generally speaking, the validity of a signature depends not upon the instrument but upon the intention with which it was made. If the intention of the signer is to make a contract or proposal for a contract a typewritten signature may be valid and binding. In those cases in which the signature is made by an agent, and this is necessarily the case whenever a corporate signature is required, the question always arises as to the authority of the agent to make the signature. I assume that in this case the person signing the proposal was duly authorized to do so by the People's Coal Company, with the intent to make a valid signature to the proposal, and therefore that the signature is valid.

Your second question is: "Does the fact that the clause

data to establish a basis for payment,' as named on said proposal, was not incorporated in the contract, eliminate from consideration the figures therein named, or is said proposal a part and parcel of said contract?"

While we must look to the contract for a determination of the rights of the parties, still, in case of doubt as to its construction, reference may be had to the specifications as an aid in interpreting the contract and in ascertaining the intention of the parties. Applying this principle to the case in hand we find in the typewritten contract, under the head of "Price," on page 3, the following:—

(a) Should the British Thermal Units be less by more than two per cent. (2%) than those specified in the analysis, the price shall be decreased one per cent. (1%) for every one per cent. (1%) they fall below the said 14,900 B. T. U. after allowing the said two per cent. (2%).

Where the analysis is distinctly referred to, yet there is none shown in the contract, and the only one known to have been considered between the parties is that set out in the specifications, to which we have to resort to ascertain what the analysis referred to is. Referring to the specifications, we find on page 4 under the head "Proximate Analysis," the following:—

The following is the approximate analysis of the coal it is proposed to furnish:—

Mixture,	. . . . .	.90
Volatile matter,	. . . . .	20.10
Fixed carbon,	. . . . .	73.14
Al,	. . . . .	5.86
B. T. U.,	. . . . .	14,961
Sphur,	. . . . .	1.25
Temperature at which ash fuses,	. . . . .	2700

This analysis, clearly referred to in the contract and found in the specifications, undoubtedly affords the proximate standard of the coal to be furnished to your institution by the People's Coal Company and indicates that 14,900 B. T. U. was adopted as the standard from which percentages were to be computed.

I note your statement that the People's Coal Company contends that 14,600 B. T. U. is the figure from which the percentage should be figured. That this construction is untenable is clearly shown by the specifications, at page 1, under the heading "Causes for Rejection," and by the typewritten contract, the language used in the contract being identical with that used in the specifications, and being as follows: "Coal containing less than 14,600 B. T. U. shall be subject to rejection." This evidently means that coal having 14,600 B. T. U. or more may not be rejected but must be accepted, while coal that runs below that standard may, at the discretion of the trustees, be rejected; in other words, the language last above quoted establishes for the purpose of this contract the line above which coal must be accepted, even though at a reduced price, and below which coal may be actually rejected, and does not and was not intended to fix the basis upon which the percentage for reduction in price is to be computed.

Your third question is: "Under the heading of 'Sampling' are these words: 'Such a sample will be taken until the total quantity amounts to about 1,000 pounds, and shall represent not more than 500 tons of coal.' If the sample amounts to the required number of pounds, may we not penalize, if necessary, to exact penalties, on lesser quantities than 500 tons?"

The language of the contract bearing directly upon the point to which your question is addressed is, "Such a sample will be taken until the total quantity amounts to about 1,000 pounds and shall represent not more than 500 tons of coal." The only limitation upon the quantity to be tested is that it shall not represent more than 500 tons. I am of the opinion that if the sample amounts to the required number of pounds you may test any quantity of coal delivered up to 500 tons, and if the coal thus tested is found to be below the standard fixed by the contract, may exact such penalties as the contract provides.

I am also requested by H. Louis Stick, M.D., superintendent of the Worcester State Asylum, to advise upon which of the following bases the decreases of price should be computed:—

1. One per cent. of price decrease for every 1 per cent. or major fraction thereof of deficiency of B. T. U.
2. One per cent. for every full 1 per cent. of deficiency.
3. Exactly the same per cent., including fractions of price decrease, as there is deficiency.

It is my opinion that such reduction should be computed in accordance with the third suggestion; that is, the rate per cent. decrease in price should be precisely the same, including fractions of 1 per cent., as the rate per cent. of deficiency in B. T. U., after allowing the 2 per cent. reduction provided for in that part of the contract above quoted.

CIVIL SERVICE — AGE LIMIT.

Under St. 1908, c. 375, § 1, a person above the age of fifty years is not eligible for appointment as inspector of factories and public buildings.

You ask my opinion upon the following question: "Is a man, not a veteran, who is above the age of fifty years and not otherwise disqualified, eligible for appointment as an inspector of factories and public buildings as a member of the inspection department of the District Police if he was placed on the eligible list by the Civil Service Commission before he was above the age of fifty years?"

To the
Civil Service
Commission.
1914
February 9.

Section 1 of chapter 375 of the Acts of 1908 provides that —

A person who is not above the age of fifty years, if otherwise qualified, shall be eligible for appointment as an inspector of factories and public buildings, as a member of the inspection department of the district police.

This statute is still in force and does not relate to the time when a person passes a civil service examination nor to the time of going on the eligible list, but to the age of the person at the time of appointment.

I am of the opinion that this statute makes persons above the age of fifty years ineligible for appointment to the position of inspector of factories and public buildings and that the rule is not affected by the date of the examination for appointment.

BUREAU OF STATISTICS — CITIES AND TOWNS — DEBT LIMIT —
EMERGENCY APPROPRIATIONS.

Under St. 1912, c. 75, § 1, it is the duty of the Director of the Bureau of Statistics to determine whether certain appropriations of cities or towns are emergency appropriations within the provisions of St. 1913, c. 719, § 5, cl. 15.

To the
Director of the
Bureau of
Statistics.
1914
February 11.

The town of Chelmsford having voted "that the town borrow the sum of \$1,500 on a promissory note for that amount to be signed in its name and behalf by the town treasurer, payable in three installments of \$500 each in one, two and three years from date thereof, with interest at a rate not exceeding 5 per cent. per annum, payable semiannually, such note to be countersigned by the selectmen, and the proceeds used to pay for the purchase of fire hose and equipment of same for the Chelmsford fire department, to be used by the town for fire purposes, and that the ownership will be and remain in the name of the town of Chelmsford, and that said money is to be expended for the town by a committee of three, consisting of the present chief of the Chelmsford Center fire department, one member of the Chelmsford Center water board, to be named by said board and one other to be named by said chief and said member of the water board," and the treasurer of that town having forwarded to you for certification a promissory note of the town drawn in conformity with this vote, you ask my opinion as to whether a loan of this character may properly be construed as coming within the authority of clause 15 of section 5 of chapter 719 of the Acts of 1913.

So far as it relates to your question, the provision of the section referred to is that —

Cities and towns may incur debt, within the limit of indebtedness prescribed in this act, . . .

For extreme emergency appropriations involving the health or safety of the people or their property.

I do not find that the word "emergency" has been given any definition in law that takes it out of its ordinary meaning. The word is defined by Webster as "any event or occasional com-

ination of circumstances which calls for immediate action to remedy pressing necessity." The word is further defined as "a sudden or unexpected happening; an unforeseen occurrence or condition." (Century Dictionary.) These definitions are as useful as any I have found in the books. The words used in statutes are usually to be understood in their ordinary signification.

Your authority in the matter of certifying notes of municipalities appears to be set forth in section 1 of chapter 45, Acts of 1912, as follows:—

That said director [referring to the director of the Bureau of Statistics] shall not certify any note as provided for in this act if it shall appear that the provisions of law relating to municipal indebtedness in the making of said note have not been properly complied with.

Whether an extreme emergency exists in any case like that now under consideration is a question of fact for the Director of the Bureau of Statistics to determine by investigation. The statutes have, in my opinion, placed upon your office the authority to decide, and the responsibility of deciding, the question.

CONSTITUTIONAL LAW—LIBERTY OF THE PRESS—DRUNKENNESS.

law which forbids the publication of the name of a person arrested for drunkenness would be unconstitutional.

You have asked my opinion whether House Bill No. 665 would interfere with the right of the press to free publication."

Section 1, which contains the gist of the proposed legislation, as follows:—

No person shall print or publish, or cause or permit to be printed or published, the name of any person arrested, arraigned, or tried for or convicted of drunkenness, unless such person shall be arrested, arraigned or tried for or convicted of some other offense in connection with the offense of drunkenness.

The provision of our Constitution relative to freedom of the press is as follows:—

To the
Committee on
Legal Affairs.
1914
February 11.

The liberty of the press is essential to the security of freedom in a state; it ought not, therefore, to be restrained in this commonwealth. (Bill of Rights, Art. XVI.)

Our Supreme Judicial Court has said: —

The obvious intent of this provision was to prevent the enactment of license laws, or other direct restraints upon publication, leaving individuals at liberty to print, without the previous permission of any officer of government, subject to responsibility for the matter printed. *Commonwealth v. Kneeland*, 20 Pick. 206, 219.

In other words, there can be no censorship of news, even by general laws. The intention of that article of the Bill of Rights was to preserve the common-law rights of the press as they then existed from interference by legislation or injunction in the future. Cooley, *Constitutional Limitations*, 6th ed., pages 512, 513.

There is a fundamental principle of common law that the publication of legal proceedings is privileged.

"Though the publication of such proceedings may be to the disadvantage of the particular individual concerned, yet it is of vast importance to the public that the proceedings of courts of justice should be universally known. The general advantage to the country in having these proceedings made public, more than counterbalances the inconveniences to the private persons whose conduct may be the subject of such proceedings." . . .

The chief advantage to the country which we can discern, and that which we understand to be intended by the foregoing passage, is the security which publicity gives for the proper administration of justice. . . . It is desirable that the trial of causes should take place under the public eye, . . . because it is of the highest moment that those who administer justice should always act under the sense of public responsibility, and that every citizen should be able to satisfy himself with his own eyes as to the mode in which a public duty is performed. *Cowley v. Pulsifer*, 137 Mass. 392, 394.

This common-law right to publish legal proceedings is protected by the constitutional provision above quoted.

But under the police power the Legislature may pass "statutes required to protect the public morals or general welfare of the people" without infringing on this right. 8 Cyc. 892.

However, it is difficult to see how the bill in question would fall within that class of statutes. It is therefore my opinion that the proposed legislation, if enacted, would be unconstitutional.

LABOR — TWENTY-FOUR HOURS' REST IN SEVEN DAYS.

It is unlawful to permit the taking of inventories by employees during the twenty-four hour rest in seven consecutive days period required to be given to them under the provisions of St. 1913, c. 619.

If I understand your letter of Feb. 6, 1914, you desire an opinion from this office upon the following question: —

To the Commissioner of Labor.
1914
February 11.

Are employers of labor in manufacturing establishments required by law to give to persons in their employ who work regularly six days in a week twenty-four consecutive hours of rest, or may employees who have worked regularly the six working days of the week be required to assist in taking an inventory on Sunday?

The law in regard to this question is contained in chapter 19 of the Acts of 1913, which provides as follows: —

SECTION 1. Every employer of labor, whether a person, partnership or corporation, engaged in carrying on any manufacturing or mercantile establishment in this commonwealth as hereinafter defined, shall allow every person, except those specified in section two, employed in such manufacturing or mercantile establishment at least twenty-four consecutive hours of rest in every seven consecutive days. No employer shall operate any such manufacturing or mercantile establishment on Sunday, unless he shall have complied with the provisions of section one; but this act shall not authorize any work on Sunday not now authorized by law.

SECTION 2. This act shall not apply to (a) janitors; (b) watchmen; (c) employees whose duties include no work on Sunday other than (1) putting sponges in bakeries; (2) caring for live animals; (3) maintaining fires; (4) caring for machinery; (5) employees engaged in the preparation, printing, publication, sale or delivery of newspapers; (6) any labor called for by an emergency that could not reasonably have been anticipated.

Your question is confined to manufacturing establishments. The term "manufacturing establishments" is defined by St. 1909, c. 514, § 17, as "any premises, room or place used for

the purpose of making, altering, repairing, ornamenting, finishing or adapting for sale any article or part of an article."

By section 5 of chapter 619 of the Acts of 1913 it is provided that —

In this act "manufacturing establishments" and "mercantile establishments" shall have the meaning defined in section seventeen of chapter five hundred and fourteen of the acts of the year nineteen hundred and nine, except that neither of said terms shall be held to include establishments used for the manufacture or distribution of gas, electricity, milk or water, hotels, restaurants, drug stores, livery stables, or garages.

I assume that in using the term "manufacturing establishments" you refer to such establishments as are within this definition and are not within the exceptions above mentioned.

The language of the statute is too clear to admit of a possible misunderstanding: "every employer of labor, . . . engaged in carrying on any manufacturing or mercantile establishment in this commonwealth as hereinafter defined, shall allow every person, except those specified in section two, employed in such manufacturing or mercantile establishment at least twenty-four consecutive hours of rest in every seven consecutive days." I do not know how your question can be more clearly answered. The language is not ambiguous.

No one regards the work of taking an inventory as rest, nor can the taking of an inventory in the ordinary course of business be regarded as "labor called for by an emergency that could not reasonably have been anticipated," within the provisions of section 2 of chapter 619, above quoted.

CONSTITUTIONAL LAW — NEWSPAPERS.

A law to prohibit contracts by publishers appointing local sole agents for the sale of periodicals would be unconstitutional.

To the
Committee on
Legal Affairs.
1914
February 13.

I am in receipt of your inquiry of February 12 relative to the constitutionality of House Bill No. 229, entitled "An Act relative to the sale of newspapers and periodicals." The

purpose of this act appears to be to prohibit contracts by publishers appointing local sole agents for the sale of periodicals.

The Constitution of Massachusetts enumerates among the natural, inalienable rights of men the right "of acquiring, possessing, and protecting property." Bill of Rights, Art. I.

The Constitution of the United States protects "life, liberty and property." U. S. Const. Amendments, Arts. V. and XIV.

These provisions of our State and Federal Constitutions protect freedom of contract. As our Supreme Judicial Court has expressed it, "the right to acquire, possess and protect property includes the right to make reasonable contracts." *Commonwealth v. Perry*, 155 Mass. 117, 121.

These rights, however, are subject to limitations, arising under the proper exercise of the police power. . . . The nature of the police power and its extent, as applied to conceivable cases, cannot easily be stated with exactness. It includes the right to legislate in the interest of the public health, the public safety and the public morals. . . . If we are to include in the definition, as many judges have done, the right to legislate for the public welfare, this term should be defined with some strictness, so as not to include everything that might be enacted on grounds of mere expediency. *Commonwealth v. Strauss*, 191 Mass. 545, 550.

It is difficult to see how the proposed bill falls within the police power. The practice which it prohibits is not contrary to public policy as laid down in the past by the primary tribunal of public policy, to wit, the Legislature. The laws prohibiting contracts which bind a buyer to buy exclusively of the seller contain provisos expressly excepting contracts of the sort aimed at in the proposed bill. See the following quotations:—

But the provisions of this section shall not prohibit the appointment of agents or sole agents for the sale of, nor the making of contracts for the exclusive sale of, goods, wares or merchandise. (R. L., c. 56, § 1.)

Provided, that nothing in this act shall be construed to prohibit the appointment of agents or sole agents to sell or lease machinery, tools, implements or appliances. (St. 1907, c. 469, § 1.)

The Supreme Judicial Court, in holding one of these statutes unconstitutional, laid stress on the fact that the statute does not

prohibit the appointment of sole agents and that it allows contracts for the exclusive sale of goods. *Commonwealth v. Strauss, supra*, p. 551.

There is nothing in the nature of periodicals to distinguish them from other goods with respect to the practice aimed at in the proposed bill. A general law prohibiting the appointment of local sole agents would tend to hamper trade without producing any appreciable general benefit to the citizens of the Commonwealth.

It is my opinion that, if enacted, the proposed bill would be unconstitutional.

LABOR — EIGHT-HOUR DAY — CONTRACT WORK.

On public work for the State performed outside the Commonwealth, citizens of this State must be given the preference.

The eight-hour law has no extra-territorial effect.

Your Board requests my opinion upon the following questions:—

1. Is there anything in the Massachusetts laws requiring us to employ citizens or residents of Massachusetts on contract work of this kind outside of the State?

2. Is there anything in the Massachusetts laws which requires that men employed on this kind of work shall not labor more than a certain number of hours a-day?

Taking up your first question, section 21 of chapter 514 of the Acts of 1909 is as follows:—

In the employment of mechanics and laborers in the construction of public works by the commonwealth, or by a county, city or town, or by persons contracting therewith, preference shall be given to citizens of the commonwealth, and, if they cannot be obtained in sufficient numbers, then to citizens of the United States; and every contract for such works shall contain a provision to this effect. Any contractor who knowingly and wilfully violates the provisions of this section shall be punished by a fine of not more than one hundred dollars for each offence.

This section clearly requires that in the construction of public works by the Commonwealth preference be given (1) to

citizens of this Commonwealth, and (2) to citizens of the United States. While it is probable that in the enactment of this statute the Legislature had in contemplation only public works within the Commonwealth, still, it seems to me that a building of the kind to be erected by your Board in San Francisco may also be considered a public work constructed by the Commonwealth, and I am of the opinion that a contract made by your Board for the construction of such building should contain the clause provided for in the section of the statute above quoted. It should not be understood, however, that such a provision in the contract will obligate the contractor to transport men from Massachusetts to San Francisco, but that it will require the contractor, whenever a citizen of this Commonwealth desires to work at the same terms upon which other men are employed by the contractor in the kind of work applied for, to give such citizen the preference; that is, generally speaking, that other things being equal, a citizen of this Commonwealth must be given work in preference to anybody else, and failing to find a sufficient number of citizens of Massachusetts to do the work on hand, the contractor must give a like preference to citizens of the United States.

Taking up your second question, I find that sections 1 and 2 of chapter 494 of the Acts of 1911, being the eight-hour law of this Commonwealth, provide as follows:—

SECTION 1. The service of all laborers, workmen and mechanics, now or hereafter employed by the commonwealth or by any county therein or by any city or town which has accepted the provisions of section twenty of chapter one hundred and six of the Revised Laws, or of section forty-two of chapter five hundred and fourteen of the acts of the year nineteen hundred and nine, or by any contractor or sub-contractor for or upon any public works of the commonwealth or of any county therein or of any such city or town, is hereby restricted to eight hours in any one calendar day, and it shall be unlawful for any officer of the commonwealth or of any county therein, or of any such city or town, or for any such contractor or sub-contractor or other person whose duty it shall be to employ, direct or control the service of such laborers, workmen or mechanics to require or permit any such laborer, workman or mechanic to work more than eight hours in any one calendar day, except in cases of extraordinary emergency. Danger to property, life, public safety or public health only

shall be considered cases of extraordinary emergency within the meaning of this section. In cases where a Saturday half holiday is given the hours of labor upon the other working days of the week may be increased sufficiently to make a total of forty-eight hours for the week's work. Threat of loss of employment or to obstruct or prevent the obtaining of employment or to refrain from employing in the future shall each be considered to be "requiring" within the meaning of this section. Engineers shall be regarded as mechanics within the meaning of this act.

SECTION 2. Every contract, excluding contracts for the purchase of material or supplies, to which the commonwealth or any county therein or any city or town which has accepted the provisions of section twenty of chapter one hundred and six of the Revised Laws, is a party which may involve the employment of laborers, workmen or mechanics shall contain a stipulation that no laborer, workman or mechanic *working within this commonwealth*, in the employ of the contractor, sub-contractor or other person doing or contracting to do the whole or a part of the work contemplated by the contractor shall be requested or required to work more than eight hours in any one calendar day, and every such contract which does not contain this stipulation shall be null and void.

The laws of a State have no extra-territorial effect. The labor laws of California will govern as to the hours of labor that may be required of men in that State. The Legislature evidently considered this phase of the question in enacting sections 1 and 2 of chapter 494 of the Acts of 1911 above quoted. Section 2 expressly provides that "every contract, excluding contracts for the purchase of material or supplies, to which the commonwealth . . . is a party which may involve the employment of laborers, workmen or mechanics shall contain a stipulation that no laborer, workman or mechanic *working within this commonwealth*, . . . shall be required," etc., clearly limiting the provisions of this section to work done or to be done in this Commonwealth. If your Board contracts to have any work done in this Commonwealth, of course all the statutes above quoted will certainly apply to such contracts.

BOARD OF REGISTRATION IN PHARMACY — REGISTERED PHARMACISTS — HOSPITALS.

Under St. 1913, c. 705, the Board of Registration in Pharmacy should pass on each application for a permit to do a drug business, and may not adopt a set of rules to govern generally.

Hospitals and dispensaries need not have registered pharmacists when in charge of competent physicians.

You request my opinion upon two questions: —

To the Board
of Registration
in Pharmacy.
1914
February 14.

1. Whether, under chapter 705 of the Acts of 1913, the Board of Registration in Pharmacy has the right to adopt rules specifying what kind of persons, firms and corporations they may deem qualified to conduct a drug store; and if they do not deem a person, firm or corporation qualified to conduct a drug store can the Board refuse the permit designated in said act?

2. Does chapter 76 of the Revised Laws make it necessary for hospitals and dispensaries to have registered pharmacists in charge of their drug dispensing departments?

Taking up your second question first, in my opinion chapter 76 of the Revised Laws does not make it necessary for hospitals and dispensaries to have registered pharmacists in charge of their drug-dispensing departments. The purpose of the law was to place the dispensing of drugs and medicines in the hands of persons skilled in that kind of business, so that it might at all times be intelligently and safely done. In dispensaries and hospitals this part of the business is always in the hands of a competent physician and the need of a registered pharmacist does not exist.

Referring to your first question, section 3 of chapter 705 of the Acts of 1913 reads as follows: —

The board of registration in pharmacy shall, upon application, issue a permit to keep open a store for the transaction of the retail drug business to such persons, firms and corporations as the board may deem qualified to conduct such a store. The application for such a permit shall be made in such manner and in such form as the board shall determine. A permit issued as herein provided shall be exposed in a conspicuous place in the store for which the permit is issued and shall expire on the first day of January following the date of its issue. The fee for the permit shall be one dollar.

Section 4 of the same chapter provides that —

No such permit shall be issued for a corporation to keep open a store for the transaction of the retail drug business, unless it shall appear to the satisfaction of the said board that the management of the drug business in such store is in the hands of a registered pharmacist.

The two sections above quoted place upon the Board of Registration in Pharmacy the duty of passing upon each application for a permit. The statute indicates that the Board may establish rules as to the form and manner in which application for a permit shall be made. As a practical matter it would be very difficult to establish rules which would determine whether an applicant should have a permit or not. It is my opinion that the statute requires the Board to act upon each application and does not authorize the Board to make a set of rules to stand in the place of its judgment.

You further ask: "Can the Board refuse the permit designated in said act?" To that I have to say that in my opinion it is the duty of the Board to refuse a permit to all persons, firms or corporations who in the judgment of the Board are not qualified to conduct such a store.

INSURANCE COMMISSIONER — INSURANCE COMPANIES — INVESTMENTS.

The words "funded indebtedness" as used in St. 1907, c. 576, § 37, cl. 3, are not synonymous with "contingent liability," and investments by insurance companies in railroad mortgage bonds are lawful where the capital stock of such railroad corporation equals at least one-third of its funded indebtedness.

To the
Insurance
Commissioner.
1914
February 16.

You request my opinion as to the right of domestic insurance companies to invest in the mortgage bonds of the Michigan Central Railroad Company under conditions which you state as follows: "The last published balance sheet of said railroad showed capital stock of \$18,738,000 and funded debt, including debentures and equipment certificates, of \$43,316,174. This latter figure, however, does not include \$14,000,000 Detroit

River Tunnel Company first mortgage bonds, which are guaranteed principal and interest by the Michigan Central Railroad, nor does this amount appear in the balance sheet of the Michigan Central Railroad." You further state that in practical effect these bonds of the Detroit River Tunnel Company are an obligation of the Michigan Central Railroad Company, since that is the only company that operates the tunnel, and all payments of interest and principal must come eventually from it. I am further informed by your office that the property of the Detroit River Tunnel Company has been leased to the Michigan Central Railroad Company for nine hundred and ninety-nine years. You do not state, however, and I do not know, whether the Detroit River Tunnel Company still keeps up its corporate existence or has surrendered its charter. I assume that this company is still in existence, that it pursues its rights under the lease and collects and receives its rentals from the Michigan Central Railroad Company, and that it is a legal corporate entity.

Clause 3 of section 37 of chapter 576 of the Acts of 1907, quoted in your letter, provides that domestic insurance companies may under certain circumstances invest —

In the bonds or notes of any railroad or street railway corporation incorporated or located wholly or in part in Massachusetts, or in the mortgage bonds of any railroad corporation located wholly or in part in any State of the United States whose capital stock equals at least one third of its funded indebtedness, which has paid regularly for the five years next preceding the date of such investment all interest charges on said funded indebtedness, and which has paid for such period regularly dividends of at least four per cent per annum upon all its issues of capital stock, or in the mortgage bonds of any railroad, railway or terminal corporation which have been, both as to principal and interest, assumed or guaranteed by any such railroad or railway corporation.

This leads, first, to the inquiry, What is funded indebtedness? The word "funded" has been defined as, —

Existing in the form of bonds bearing regular interest; constituting or forming part of the permanent debt of a government or corporation at a fixed rate of interest. (Century Dictionary.)

The term "funded debt," "even in common parlance, is never made use of to describe an ordinary debt growing out of a transaction with one individual and represented by a single instrument. It is essential to the idea of a funded debt, even under the broadest use of the term, that the debt should be divided into three parts or shares, represented by different instruments, so that such parts or shares may be readily transferable." *Ketchum v. City of Buffalo*, 14 N. Y. 356.

Taking these definitions of the word "funded" in connection with the word "indebtedness," it becomes evident that funded indebtedness is a very different thing from contingent liability. In the question you submit there appears to be nothing more than a contingent liability of the Michigan Central Railroad Company so far as the bonds of the Detroit River Tunnel Company are concerned; that is, the railroad company will have to pay if the tunnel company fails to meet its obligation. So far as we are informed, the Detroit River Tunnel Company is still in existence, and the rentals reserved to it in the lease of its property are regularly paid, and may be supposed to be sufficient to provide for the payment of its liabilities. It is in my opinion, upon the information at hand, that the bonds of the Detroit River Tunnel Company are not a part of the funded indebtedness of the Michigan Central Railroad Company and that, within the limitations fixed by our statutes, insurance companies may invest in the mortgage bonds of the Michigan Central Railroad Company.

STATE BOARD OF HEALTH—LOCAL BOARDS OF HEALTH— INSPECTORS OF SLAUGHTERING.

A local board of health cannot lawfully nominate one of its own members as inspector of slaughtering, and the State Board of Health is within its rights refusing to approve a nomination so made.

To the
State Board
of Health.
1914
February 17.

You ask my opinion upon certain facts which in your communication to this department under date of Oct. 28, 1914 you stated as follows:—

In accordance with chapters 297 and 534 of the Acts of 1911, the board of health of a certain town has nominated as inspector of slaughtering one of its own members. In other words, two members of the local board of health have voted for the third to fill this office as inspector of slaughtering. In this position, the nominee has been a party to his own appointment to a position in which he will have to pass upon the character of his own work and upon the amount of the compensation which is to derive from it.

The question at issue is, can such an appointment be considered legal by this Board?

The statute conferring authority upon your Board in regard to the approval of nominations of inspectors of slaughtering is section 2 of chapter 534 of the Acts of 1911, which provides as follows:—

For the purposes of this act inspectors shall be appointed, shall be compensated, and may be removed in accordance with the provisions of chapter 534 relating to inspectors of animals. The first appointments under this act shall be made within thirty days after its passage.

By this statute the duties of the State Board of Health in respect to inspectors of slaughtering are the same as those imposed by law upon the chief of the Cattle Bureau of the State Board of Agriculture in respect to inspectors of animals.

The duties of the chief of the Cattle Bureau in this respect are set forth in chapter 143 of the Acts of 1911, section 1 of which reads as follows:—

The mayor and aldermen in cities, except Boston, and the selectmen in towns shall annually, in March, nominate one or more inspectors of animals, and before the first day of April shall send to the chief of the cattle bureau of the state board of agriculture the name, address and occupation of each nominee. Such nominee shall not be appointed until approved by the chief of the cattle bureau of the state board of agriculture. The aforesaid officials of cities and towns may remove any inspector, and shall thereupon immediately nominate another in his place and send notice thereof as prescribed above.

The section last quoted clearly provided that no nominee could be appointed inspector of animals until approved by the chief of the Cattle Bureau, and I am therefore of the opinion

that a nominee for the position of inspector of slaughtering cannot be appointed until he is approved by your Board. I am aware that since the enactment of chapter 143 the office of chief of the Cattle Bureau has been abolished and another office created to which the duties of the chief of the Cattle Bureau and the Board of Cattle Commissioners have been transferred but this change cannot make any difference as to your authority. As the law now stands I am of the opinion that the question of approving or refusing to approve the appointment of an inspector of slaughtering is one that rests entirely within the sound discretion and judgment of your Board.

You state, however, that the claim is made that under the statute "the only duty which the State Board of Health has to perform in relation to the approval or disapproval of the appointment of local inspectors of slaughtering is to pass upon their qualifications to perform the duties of that office; that when the State Board of Health is satisfied that any nominee is by training and experience qualified to fulfil the duties of the office it has exhausted its power in the matter, and has no right to question the legality of the act of the local board of health in nominating one of its own members." I do not think the duties of the State Board of Health in respect to this class of appointments are confined within such narrow limits; but if it is so, the element of self-interest in the appointee goes directly to the question of his qualification properly to discharge the duties of the position. In the case of *Gaw v. Ashle*, 195 Mass. 173, where the question was as to whether under city ordinance the board of health of the city of New Bedford could lawfully and properly elect one of themselves to the office of quarantine physician, the Supreme Judicial Court said:—

We are of opinion that they could not. The ordinance contemplated the existence of a relation between the physician and the board which requires that he shall not be a member of it. He is to make frequent reports to the board, and from time to time is to make recommendations. His charges to the sick are to be only such as the board approves. His personal interest in these charges is inconsistent with the proper performance of his duty, as a member of the board of health, to fix the amount, in the interest of the public and for the protection of his patient

There is very ancient and high authority for the assertion that a man cannot serve two masters.

It is my opinion that the action of the State Board of Health in refusing to approve nominations for the office of inspector of slaughter, on the ground that the nominees were members of the local board of health, was legally correct.

BUREAU OF STATISTICS — CERTIFICATION OF TOWN NOTES.

Under St. 1913, c. 719, the Director of the Bureau of Statistics may certify notes of a fire district where the district has complied with the spirit and purpose of the statute, even though statutory language was not followed in the vote providing for such notes.

You request an opinion from this department upon the following question: Ought the Director of the Bureau of Statistics certify under the provisions of chapter 719 of the Acts

To the
Director of
the Bureau
of Statistics.
1914
February 19.

1913 a promissory note of Greenfield Fire District No. 1, issued in accordance with an article in the warrant for a meeting of the voters of said district and with a vote of the meeting held under and by virtue of said warrant, but which does not expressly provide that the debt incurred "shall be made payable from the revenue of the financial year in which the same is to be incurred"?

You state that the article in the warrant and the vote taken thereon are as follows: —

Article 4. — To see if the district will vote to borrow any sum or sums of money appropriated under the foregoing articles.

Voted, That the district borrow the sum of five thousand dollars (\$5,000), giving a note of the district in payment therefor, signed by the treasurer and countersigned by the prudential committee, and payable November 1, 1914, with interest not to exceed $4\frac{1}{2}$ per cent per annum.

The statute, St. 1913, c. 719, § 3, provides for temporary loans in anticipation of the revenue of the financial year in which the debt is incurred and expressly made payable therefrom by such vote.

I gather from your letter that the note submitted for cer-

tification is drawn in accordance with the vote above set forth; that the debt represented by the note is incurred for the only purpose for which the fire district is authorized to incur debt, and that the only possible way in which it can be paid at maturity is from the revenue of the current year. You further state that "the note seems to all intents and purposes to be a note issued in anticipation of taxes."

The vote did not follow the precise language of the statute and the real question is whether this departure places upon the Director of the Bureau of Statistics the duty of refusing to certify the note issued in pursuance of it.

In this instance, although the district did not follow the exact words of the statute, it did follow its spirit and purpose. A very ancient writer has said:—

It is not the words of the law but the internal sense of it that make the law, and our law, like all others, consists of two parts, namely, body and soul. The letter of the law is the body of the same, and the sense and reason of the law are the soul of the law. . . . And it often happens that when you know the letter you know not the sense, for sometimes the sense is more confined and contracted than the letter, and sometimes it is more large and extensive. (2 Plowden, 445.)

The intention of the Legislature was to compel the municipal corporations of the State to adopt the policy of paying as they go and to restrain them from incurring any debt except for certain specified purposes.

Greenfield Fire District No. 1 has in this instance complied with the spirit and purpose of the statute. To refuse to certify the note in question would put the district to the trouble and expense of holding another meeting to pass a vote slightly different in words from the vote already passed but of exactly the same purpose and intention.

In such cases as this the rule applies that the spirit and reason of the law will prevail over its letter. It is my opinion that you may properly and lawfully certify the note in question.

CIVIL SERVICE — FIRE DEPARTMENT — PROMOTION.

Under St. 1913, c. 487, a call fireman is eligible to appointment as a member of the permanent force of firemen, under certain conditions, without being subject to civil service rules, but such call fireman cannot legally be promoted to the office of captain of such permanent force.

You ask my opinion upon the following question: May a
all fireman be appointed captain in a permanent force of fire-
men, under the provisions of chapter 487 of the Acts of 1913?
Section 1 of that act provides as follows: —

To the
Civil Service
Commissioners.
1914
February 19.

Cities and towns which have a call or part call fire department which
now is or may hereafter be subject to the civil service rules may, on the
recommendation of the board of engineers of the fire department or of the
officer or board having charge of the fire department, appoint as members
of the permanent force without civil service examination any persons
who have served as call men or part call men for five or more successive
years: *provided*, that such persons are certified by the city or town phy-
sician to be competent physically for the duty. If there is no city or
town physician, then the said certification shall be made by a physician
designated for the purpose by the board of engineers or other authority,
as aforesaid.

Prior to the enactment of this statute promotion or transfer
from the call to the permanent fire force of a city or town
could be made only after an open competitive examination
(Civil Service Rule No. 38, cl. 2), and the promotion, if granted,
was to the lowest grade of the permanent force. By section 1
of chapter 487 of the Acts of 1913, above quoted, five or more
successive years of service as a call fireman, together with the
certificate of the city or town physician or of such other physi-
cian as may be designated for the purpose by the board of
engineers or other authority, is substituted for the competitive
examination provided in that part of Civil Service Rule No. 38
above referred to.

While the question is not entirely free from difficulty, it is
my opinion that the Legislature did not intend to make a call
fireman eligible to appointment as captain in the permanent
force, but, subject to the conditions specified in the statute, to

appointment as a member of the permanent fire force; and I am also of the opinion that under the provisions of the statute referred to a call fireman cannot legally be promoted directly to the office of captain in the permanent fire-fighting force of a city or town.

It is perhaps needless to say that after a call fireman becomes a member of the permanent force he is eligible for promotion like any other member of that force, in accordance with the provisions of the Civil Service Rules.

COMMISSIONERS ON FISHERIES AND GAME — CITY AND TOWN CLERKS — CUSTODY OF REGISTRATION BOOKS.

Books of hunters' certificates of registration should be retained by the respective city and town clerks, and the Commissioners on Fisheries and Game have no authority to demand their return.

To the Commissioners on Fisheries and Game.
1914
February 24.

You have requested my opinion upon the following question: Have the Commissioners on Fisheries and Game authority, under chapter 614 of the Acts of 1911, as amended by chapter 379 of the Acts of 1912, to demand the return to them of books of hunters' certificates of registration furnished by the commissioners to town and city clerks?

Section 9 of chapter 614 of the Acts of 1911 provides as follows: —

Every city and town clerk shall report all such registration in books kept for that purpose, which books shall be open to public inspection during the usual office hours of such clerk, and subject to audit and inspection by the commissioners on fisheries and game, by the state auditor, or by their agents, at all times; and said clerk shall, on the first Monday of every month, pay to the board of commissioners on fisheries and game all money received by him for the said registrations, except the recording fees which he is entitled to retain, as provided in section six, together with a receipted bill for fees due and received in accordance with section six of this act, issued during the month preceding. All remittances shall be made by certified check, United States post office money order, express money order or lawful money of the United States. The board of commissioners on fisheries and game shall, in accordance with the provisions of section fifty-six of chapter six of the Revised Laws, pay to the treasurer

and receiver general all money received by them for the said registrations issued during the previous month, and shall furnish him with a list of the number and kind of registrations recorded by each city and town clerk during the previous month.

This section makes provision that the books in question 'shall be open to public inspection during the usual office hours of such clerk, and subject to audit and inspection by the commissioners on fisheries and game, by the state auditor, or by their agents, at all times,' but does not provide for the return of the books in question to your commission. The statute apparently intends that the books shall be retained by the respective town and city clerks, in whose offices they are to be subject to audit by the proper authorities and open to public inspection.

I am of the opinion that the Commissioners on Fisheries and Game have not authority to demand the return of books of hunters' certificates furnished by them to town and city clerks.

CIVIL SERVICE — PLANNING BOARD OF THE CITY OF BOSTON.

St. 1913, c. 494, creating planning boards in cities and providing for appointments to such boards by the mayors, subject to approval by the council, does not repeal St. 1909, c. 486, § 9, requiring action by the Civil Service Commission on Boston appointments.

You ask my opinion upon the following question: "As the law now stands are appointments by the mayor of Boston to the planning board of that city to be confirmed by the city council or approved by the Civil Service Commission?" The question is whether chapter 494 of the Acts of 1913 repeals the provisions of sections 9 and 10 of chapter 486 of the Acts of 1909 in so far as they relate to appointments to a city planning board of the city of Boston.

Section 9 of chapter 486 of the Acts of 1909, being the charter of the city of Boston, is as follows:—

All heads of departments and members of municipal boards, including the board of street commissioners, as their present terms of office expire

To the
Civil Service
Commission.
1914
February 24.

(but excluding the school committee and those officials by law appointed by the governor), shall be appointed by the mayor without confirmation by the city council. They shall be recognized experts in such work as may devolve upon the incumbents of said offices, or persons specially fitted by education, training or experience to perform the same, and (except the election commissioners, who shall remain subject to the provisions of existing laws) shall be appointed without regard to party affiliation or to residence at the time of appointment except as herein-after provided.

Section 10 of the same chapter, after making provision for certain forms of certificates of appointment, provides that the certificate (meaning the certificate of appointment above referred to) —

shall be filed with the city clerk, who shall thereupon forward a certified copy to the civil service commission. The commission shall immediately make a careful inquiry into the qualifications of the nominee under such rules as they may, with the consent of the governor and council, establish, and, if they conclude that he is a competent person with the requisite qualifications, they shall file with the city clerk a certificate signed by at least a majority of the commission that they have made a careful inquiry into the qualifications of the appointee, and that in their opinion he is a recognized expert, or that he is qualified by education, training or experience for said office, as the case may be, and that they approve the appointment.

This section further provides that upon filing of the certificate of approval the appointment shall become operative. Section 10 has been amended by chapter 550 of the Acts of 1912, but does not in any way affect the provisions above quoted.

Chapter 494 of the Acts of 1913 provides that every town having a population of more than ten thousand at the last preceding national or state census and every city in the Commonwealth shall create a board to be known as the planning board. It further provides that —

In cities, the said board shall be appointed by the mayor, subject to confirmation by the council, and in cities under a commission form of government, so called, the members of the board shall be appointed by the governing body of the city.

It has been stated as a general rule of law governing such cases as are suggested by your question that —

When the provisions of a general law, applicable to the entire State, are repugnant to the provisions of a previously enacted special law, applicable in a particular locality only, the passage of such general law does not operate to modify or repeal the special law, either in whole or in part, unless such modification or repeal is provided for by express words, or arises by necessary implication. (Cyc., Vol. 36, p. 1090.)

The point involved was considered by the Supreme Judicial Court of this Commonwealth in the case of *Brown v. Lowell*, 3 Met. 172, and the court, speaking by Chief Justice Shaw, said: —

That a subsequent legislative act repeals all prior acts repugnant to it, is a principle which results from the unlimited nature of legislative power. The last expression of the legislative will must be carried into effect, as the law of the land; and if, on its true construction, it is directly repugnant to any prior act, it necessarily annuls it, because both cannot exist together. But, to have this effect, it must appear that the legislative will was so exercised; or, in other words, that it was the intention of the legislature, that the subsequent act should so operate, notwithstanding any repugnancy to former acts. It may happen that acts of special legislation may be made in regard to a place, growing out of its peculiar wants, condition, and circumstances; as formerly various acts were passed in relation to the town of Boston. Afterwards, a general act may be passed, having some of the same purposes in view, extending them generally to all the towns of the Commonwealth, with provisions adapted to the condition of all towns. It would be a question depending upon a careful comparison of the two acts, and the objects intended to be accomplished, whether the general act must be deemed an implied repeal of the special prior act. In general, we should think it would require pretty strong terms in the general act, showing that it was intended to supersede the special acts, in order to hold it to be such a repeal.

This language was referred to and quoted with approval in *Opeland v. Springfield*, 166 Mass. 498.

In the case last cited the question was whether a provision of the charter of the city of Springfield, conferring authority upon the city to cause sidewalks to be made and repaired and to assess the whole expense upon the abutters, was repealed by the provisions of chapter 444 of the Acts of 1895, to the effect

that the board having power to establish sidewalks in any city may construct or complete walks in any street where public convenience requires it and may assess upon abutters not more than one-half of the expense.

The court in that case held that the special provision of the city charter had not been repealed by the later enactment, and cited many authorities.

If the later enactment is evidently intended to supersede all prior acts of the matter in hand, and to comprise in itself the sole and complete system of legislation on that subject, it must, as the last expression of the legislative will, prevail.

Turning to an examination and comparison of the two statutes in question, we find that the object and purpose of chapter 494 of the Acts of 1913 are to provide that cities and towns shall have a planning board, and that the matter of confirmation of appointments to such boards is a mere detail or adjunct to the general plan; while the object, purpose and intent of sections 9 and 10 of chapter 486 of the Acts of 1909, so far as their purpose can be gathered from their language, were to establish such a system as would insure to the city of Boston expert service from the heads of all city departments and from the members of all municipal boards, and to this end a special system for an examination as to the qualifications of appointees and approval of appointments to those leading positions in the government of the city by the Civil Service Commission was provided for. The purpose, intent and object that prompted the two enactments in question were so widely different that I cannot believe it to have been the intention of the Legislature of 1913, in the enactment under consideration, to make any change in the method of appointment and confirmation to any municipal board of the city of Boston.

It is my opinion that appointments to the planning board of the city of Boston are within the provisions of sections 9 and 10 of chapter 486 of the Acts of 1909 and that your Board has the same duty and authority as to such appointments that it has in respect to appointments to other municipal boards of that city.

LIQUOR LAW — LICENSES RENDERED VOID, WHEN — CONVICTION — APPEAL.

The provisions of R. L., c. 75, § 107, rendering a liquor license void upon conviction of the licensee, do not apply while an appeal on conviction in a lower court is pending.

You ask my opinion as to whether a license granted under the provisions of section 100 of chapter 75 of the Revised Laws is rendered void by the conviction of the person holding the license in a police or district court of a violation of section 106 of said chapter, an appeal from said conviction having been taken which is still pending.

To the
State Board of
Health,
1914
February 25.

Section 107 of chapter 75 of the Revised Laws provides as follows: —

A conviction under the provisions of the preceding section of any person licensed under the provisions of section one hundred shall render his license void, and no new license shall be granted to him for the balance of the term.

The word "conviction" as used in this section is evidently used as implying a final judgment and sentence of the court upon a verdict or confession of guilt. Under the provisions of the statute last above quoted, the effect of a conviction of the kind therein named is to deprive the person convicted of a valuable right without an opportunity for further trial or investigation. It is very readily apparent that the trial in the appellate court may result in establishing the innocence of the accused, in which case the license ought not to become void but to remain in force. It is my opinion that in the circumstances disclosed by your inquiry the license in question does not become void while an appeal is pending.

LABOR — POLICE OFFICERS — CHAUFFEURS.

Chauffeurs employed as drivers of a police patrol and receiving pay as such are subject to the laws regulating the hours of labor of chauffeurs and not of police officers, even though they are special police officers by appointment and serve as such without pay.

To the Com-
missioner of
Labor.
1914
February 25.

I have your letter with inquiry from the chief of police in Newton, in which he says:—

I am employing two chauffeurs as drivers of the auto patrol, one of whom works from 8 A.M. to 6 P.M., the other from 6 P.M. to 8 A.M. the following morning. These men are citizen operators, but are appointed special police without pay and draw their salaries as chauffeurs.

Will you kindly inform me if the fact that they are police officers makes their employment of over eight hours a day legal, or am I violating the labor law?

The chief of police does not state whether the city of Newton has accepted the provisions of the eight-hour law, so called. I assume, however, that it has done so. As I understand the letter of the chief, the two men mentioned are not employed as policemen but as chauffeurs, they draw no salary as police officers but are paid for the work they actually perform, and are classified on the pay roll as chauffeurs and not as police officers.

It is my opinion that the hours of labor of these men should be governed by the kind of service for which they are actually employed and paid, and the fact that they are special police officers without pay does not, in my opinion, affect the number of hours of labor that shall constitute for them a day's work.

BOARD OF EDUCATION — TRANSPORTATION OF PUPILS — "PRECEDING YEAR" DEFINED.

Where towns or cities under St. 1913, c. 396, are required to provide transportation for high school pupils attending school in other towns or cities, the statute is not to be construed as authorizing towns to provide board for such pupils. Under this section the words "the preceding year" refer to the fiscal school year as used in St. 1913, c. 356.

You ask for an opinion upon questions that have arisen with regard to certain provisions of chapter 396 of the Acts of 1913, as follows: —

To the
State Board of
Education.
1914
February 25.

1. In some instances, parents whose children are attending high schools in other towns or cities than that of their residence are asking school committees to make payment for the board of these children. Can such a claim be recognized as coming within the term "transportation" as used in the act?
2. A statement is desired as to the meaning of the term "the preceding year" as found in lines 18 and 24 of this act. Does the year mean the calendar year of the town?

In July, 1914, towns will send to the Board of Education statements of amounts paid for transportation, under this act, for the school year ending June 30, 1914; in such a case, is reimbursement to be based upon the payments from local taxation for schools for the town year closing before July 1, 1914, or for the town year closing before July 1, 1913?

Replying to your first question, I have to say that in view of the statutory rule that "words and phrases shall be construed according to the common and approved usage of the language," it is my opinion that a claim made by reason of payment for board of children cannot be recognized as coming within the term "transportation" as used in the statute above referred to.

You have also requested a construction of the phrase "the preceding year" in the same statute.

By another act of 1913, namely, chapter 356, the annual return by school committees to the State Commissioner of Education of the amount raised and expended by each town for school purposes, although made annually at the close of the school year, refers to the taxes of the last preceding *fiscal* year.

The statute before me provides, in the case of the amount paid for out-of-town high school education, for a return within thirty days of the expenditure. But as payment between towns is by custom always made at the close of the school year, the statutory requirement amounts to a requirement for annual returns at the close of each school year.

The statute before me does not provide for annual reimbursements or for any form of returns in the case of the amount paid for transportation. Nevertheless, I understand that, in conformity with the custom as to high school reimbursement and the statutory requirement as to all other returns, the State Commissioner of Education requires an annual return by *school* years at the close of each school year, and makes an annual reimbursement on the basis of such return.

Thus we have annually at the close of the school year two returns, one showing the amount paid for transportation during the last *school* year, the other showing the amount expended for the support of public schools during the last *fiscal* year. The most reasonable rule would appear to be to reimburse the towns on the basis of the two returns which are due together.

Considered in connection with the custom, it is my opinion that the words "the preceding year," in chapter 396 of the Acts of 1913, should be construed as referring to the same year as the words "the fiscal year last preceding the date of the certificate," in chapter 356.

CONSTITUTIONAL LAW — CITIES AND TOWNS — ICE.

A law enacted by the Legislature authorizing cities and towns to cut, store and sell ice from reservoirs and ponds owned or controlled by such cities and towns would be unconstitutional, and they may not acquire or hold property for such purposes.

To the
Senate and
House of Rep-
resentatives.
1914
February 26.

You have required my opinion upon the following questions: —

First. — Is it within the constitutional power of the General Court to enact a law conferring upon a city or town within the Commonwealth the power, acting by its water commissioners, to cut, store and sell ice

om reservoirs and ponds owned or controlled by such city or town in connection with its water supply?

Second. — Is it within the constitutional power of the General Court to enact a law conferring upon a city or town within the Commonwealth the power to cut ice in the reservoirs and ponds owned or controlled by such city or town, and to store the ice and to sell it at wholesale or retail, and to fix and collect rates to be paid therefor, and to acquire by lease or purchase and to hold property, lands and easements for said purposes?

Third. — Is it within the constitutional power of the General Court to enact a law conferring upon a city which owns and operates a system for supplying its inhabitants with water, acting by its water commissioners, the power to cut ice in the reservoirs, ponds and other sources of water supply owned and controlled by such city, and to store the ice so cut and sell the same at prices fixed by the water commissioners?

The real question is: May a city be authorized by the Legislature to cut, store and sell ice from reservoirs, ponds and other sources of water supply owned or controlled by such city or town; in other words, may a city or town deal in ice cut and harvested from reservoirs or ponds which it owns or controls? In recent years it has become more and more urgent to have the municipalities, under legislative sanction, construct, maintain and operate public utilities, and to regulate the operation and to control the rates of charges for commodities furnished and services rendered to the public. In England and in some of the European countries the scope of municipal operations has been greatly extended, and these operations are known as municipal trading." In the United States, however, the limitations and restrictions placed upon legislative authority by the written Constitutions of the respective States have formed an obstacle which has prevented the development of municipal trading to any degree that even attempts to approach the extent which it has reached in England. (Dillon on Municipal Corporations.)

The test of constitutionality is whether the service proposed is a public service.

If such a business as is suggested by these questions is to be carried on it must be with money raised by taxation, and it is settled in this Commonwealth "that the Legislature can

authorize a city or town to tax its inhabitants only for public purposes." *Opinion of the Justices*, 155 Mass. 598.

Great difficulty has been found in clearly defining a public purpose, and in the opinion last cited the learned justices said:—

It is not easy to determine in every case whether a benefit conferred upon many individuals in a community can be called a public service within the meaning of the rule that taxes can be laid only for public purposes.

Again, the justices of the Supreme Judicial Court have said:—

It is impossible to define with entire accuracy all the characteristics which distinguish a public service and a public use from services and uses that are private. (*Opinion of the Justices*, 150 Mass. at p. 595.)

The Legislature of 1892 requested the opinion of the justices of the Supreme Court as to whether the Legislature could constitutionally authorize a city or town to buy coal and wood in excess of its ordinary requirements for the purpose of selling such excess to its own citizens. Several questions of the same import were propounded to the justices. In response to these inquiries the justices said, in part, that the question —

must be determined by considering whether the carrying on of such a business for the benefit of the inhabitants can be regarded as a public service. This inquiry underlies all the questions on which our opinion is required. If such a business is to be carried on, it must be with money raised by taxation. It is settled that the Legislature can authorize a city or town to tax its inhabitants only for public purposes. This is not only the law of this Commonwealth, but of the States generally and of the United States. (*Opinion of the Justices*, 155 Mass. 601.)

The Legislature of 1903 required the opinion of the justices upon various questions in regard to the purchase of coal and wood as fuel by a city or town in excess of its ordinary requirements, for the purpose of selling such excess to its inhabitants or others (1) at cost, (2) at less than cost, or (3) at a profit. In a discussion of the principles involved the learned justices said:—

There is nothing materially different between the proposed establishment of a governmental agency for the sale of fuel and the establishment

of a like agency for the sale of other articles of daily use. The business of selling fuel can be conducted easily by individuals in competition. It does not require the exercise of any governmental function, as does the distribution of water, gas and electricity, which involves the use of the public streets and the exercise of the right of eminent domain. It is not important that it should be conducted as a single large enterprise with supplies emanating from a single source, as is required for the economical management of the kinds of business last mentioned. It does not even call for the investment of a large capital, but it can be conducted profitably by a single individual of ordinary means. (*Opinion of the Justices*, 32 Mass. 605.)

In the opinion last above cited the justices further said:—

Until within a few years it generally has been conceded, not only that it would not be a public use of money for the government to expend it in the establishment of stores and shops for the purpose of carrying on a business of manufacturing or selling goods in competition with individuals, but also that it would be a perversion of the function of government for the State to enter as a competitor into the field of industrial enterprise, with a view either to the profit that could be made through the income to be derived from the business, or to the indirect gain that might result to purchasers if prices were reduced by governmental competition. There may be some now who believe it would be well if business was conducted by the people collectively, living as a community, and represented by the government in the management of ordinary industrial affairs. But nobody contends that such a system is possible under our Constitution. It is plain, however, that taxation of the people to establish a city or town in the proprietorship of an ordinary mercantile or manufacturing business would be a long step towards it. If men of property, owning coal and wood yards, should be compelled to pay taxes for the establishment of a rival coal yard by a city or town, to furnish fuel at cost, they would thus be forced to make contributions of money for their own impoverishment; for if the coal yard of the city or town was conducted economically, they would be driven out of business. A similar result would follow if the business of furnishing provisions and clothing, and other necessities of life, were taken up by the government; and men who now earn a livelihood as proprietors would be forced to work as employees in stores and shops conducted by the public authorities. (*Opinion of the Justices*, 182 Mass. at p. 607.)

In 1907 a bill to authorize the city of Holyoke to "cut and harvest ice from any great pond or river in its limits, and from

any ponds or reservoirs used by the municipality as a water supply, and to store and sell the same at wholesale to the inhabitants of the city" was submitted by the Governor to the then Attorney-General, Hon. Dana Malone, whose opinion was that the bill referred to could not constitutionally be enacted.

I am unable to differentiate between the business of dealing in coal and fuel and other necessities of life and the business of cutting, harvesting and selling ice. The fact that in the instances specified in the questions submitted to me the ice is to be cut from reservoirs, ponds or other sources of water supply owned or controlled by the city or town cutting, storing and selling it does not, in my opinion, materially change the legal aspect of these questions.

In view of the opinions of the justices and of my learned predecessor, above quoted, and of the provisions of the Constitution, I am constrained to the conclusion that all the questions submitted to me in this inquiry must be answered in the negative, and that such legislation as is suggested by these inquiries if enacted, would be unconstitutional.

STATE HOSPITALS — BOARDS OF TRUSTEES — SALARIES OF OFFICERS — WHEN SUBJECT TO APPROVAL OF GOVERNOR AND COUNCIL.

Where offices are created in connection with State institutions under St. 1909 c. 504, either directly or by action of the trustees, salaries to be paid persons holding such offices must be approved by the Governor and Council.

To the
Governor.
1914
March 3.

You have requested my opinion as to who, among the appointees of a board of trustees of one of the State hospitals, are persons whose salaries are subject to approval by the Governor and Council under the provisions of section 18 of chapter 50 of the Acts of 1909. Section 17 of the same chapter has some bearing upon the answer to your inquiry and provides in part as follows: —

The trustees of each institution shall have charge of the general interests thereof, and shall see that its affairs are conducted according to law and to the by-laws and regulations established by them.

Section 18 provides as follows: —

They shall appoint a superintendent who shall be a physician and who shall constantly reside at the institution, assistant physicians, one of whom in each institution for the insane in which women are received as patients and in which more than two assistant physicians are employed shall be a woman, and a treasurer who shall give bond for faithful performance of his duties; shall appoint or make provision in by-laws for appointing such officers as in their opinion may be necessary for conducting efficiently and economically the business of the institution; and shall determine, subject to the approval of the governor and council, the salaries of all the officers. All their appointments shall be made in such manner, with such restrictions and for such terms, as the by-laws may prescribe. . . . The trustees shall also establish by-laws and regulations, with suitable penalties, for the government of the institutions, and shall provide for a monthly inspection and trial of the fire apparatus belonging to the institutions, and for the proper organization and monthly drill of the officers and employees in its use.

This question was propounded to one of my predecessors in office, the Honorable Dana Malone, and I quote his opinion in full: —

It is evident that the word "officers" is used in the statute in a special sense, and that for a position in the hospital to be an "office," within the meaning of the statute providing that the trustees shall appoint "such officers as in their opinion may be necessary for conducting efficiently and economically the business of the institution," it is not necessary that the position should have all the attributes of an office considered as public office.

In my opinion, the intent of the statute is that the Governor and Council shall have submitted to them for their approval the proposed compensation of all persons who hold positions in the institution which are created as positions by the trustees, and who are paid salaries, as distinguished from those persons who do not hold distinct positions and are employed for wages.

While I agree with the views and conclusion of my learned predecessor, I will add that this statute, to my mind, distinguishes clearly between officers and employees of the institutions. The statute creates and provides for several offices in each institution. It establishes the offices of superintendent, assistant physicians and treasurer, and confers upon the board

of trustees authority to create additional offices under such title, in such number and of such character as in its opinion may be necessary for conducting efficiently and economically the business of the institution, and authorizes it to make appointments to the offices it has created. Under its provisions the salaries pertaining to offices created by the statute itself or by act of the board of trustees are all subject to the approval of the Governor and Council. The by-laws made by the trustees in pursuance of the provisions of the statute or the records of the proceedings of the trustees should show every office created by them. If, for instance, the board of trustees, acting under the authority granted by the statute, has created the office of chief engineer, the salary attached to that office is subject to the approval of the Governor and Council. If, however, the board of trustees has not created that office, then the Governor and Council have no concern with the salary paid to the man employed as chief engineer. In the one case he becomes an officer under the statute, whose salary must be subject to the approval of the Governor and Council, and in the other he is simply an employee, with whose salary the Governor and Council have no concern.

I have not the by-laws or other records of proceedings of the board of trustees before me, and am therefore unable to render a more definite opinion upon the matter you have in hand.

The question whether the chief engineer or the bookkeepers are officers or employees is, in my opinion, to be determined by reference to the action of the board of trustees in establishing offices under the statute.

BOARD OF EDUCATION -- RESIDENCE OF MINORS FOR SCHOOL PURPOSES.

The word "residence," under St. 1911, c. 471, § 7, relating to applicants for admission to an industrial, agricultural or household arts school, means the actual residence of such applicants.

To the State
Board of
Education.
1914
March 10.

You have requested my opinion relative to the meaning of the words "residence" and "resides" as used in section 7 of chapter 471 of the Acts of 1911. You make reference in your

communication to certain cases of "particular difficulty," as, where pupils who are in attendance upon the evening industrial school in Boston move to an adjoining city or town.

Each case of this class depends so much upon its own circumstances that it is difficult to find authorities for anything more than a few general positions which are plain and well understood. (*Sears v. Boston*, Met. 250.)

It is said that one is a resident of a place from which his departure is indefinite as to time, definite as to purpose; and for this purpose he has made the place his temporary home. 3 Fed. Rep. 311.

The word "residence" has been defined as meaning "personal presence in a fixed and permanent abode." Where a resident of a particular place goes to another place or country, the great question whether he has ceased to be a resident of one place and become a resident of another will depend mainly upon the question, to be determined from all the circumstances, whether the new residence is temporary or permanent, whether it is occasional, for the purpose of a visit or of accomplishing a temporary object, or whether it is for the purpose of continued residence and abode until some new resolution be taken to remove. *Sears v. Boston*, *supra*.

The word "residence" is used in different senses. Generally, in the laws relating to taxation, voting and settlement, it means the same as domicile; and usually it means the same in the law of divorce, although with a well-recognized exception.

Generally speaking, the question as to what constitutes residence is mainly a question of fact, and the element of intention enters into it. The residence must be both actual and intended. *in re Dr. Munroe*, 5 Mad. Ch. R. 379.

Actual residence and the intention to remain there permanently or for an indefinite time without any fixed or certain purpose to return to the former place of abode are required to constitute a change of domicile. (*Winans v. Winans*, 205 Mass. 388, 391.)

And the intention may even be to reside for a definite term of years, as in the case of a minister (*McCrary*, Elections, 559),

or of a mechanic, day laborer or student. *Lyman v. Fiske*, 17 Pick. 231.

Each successive domicile continues, until changed by acquiring another. (*Opinion of the Justices*, 5 Met. 587.)

That is to say, one never has at any given time more than one place of domicile; and until one's purpose to change his place of domicile or residence has become fixed, he cannot be said to have abandoned a former residence. *Oliveri v. Atkinson*, 168 Mass. 28; *Worcester v. Wilbraham*, 13 Gray, 586.

Your concern, however, is chiefly as to the residence of minors. The residence of a minor follows that of the father, if he is living, and of the mother if the father is dead. Illegitimate children take the residence of the mother. 14 Cyc. 843-4. So that it becomes necessary in many cases to consider the residence of the father, or of the mother if the father is dead.

In the case of a person above the age of twenty-one years parental support is immaterial unless accompanied by other facts tending to show legal residence with the parents.

The word "residence" as used in the statutes referred to in your communication seems to have a somewhat different signification than in the cases I have referred to.

I note your statement that you have ruled that "every child shall have a right to attend the public schools of the city or town where he actually resides," and that actual residence in a municipality constitutes the applicant a resident, for the purposes of chapter 471 of the Acts of 1911. I am of the opinion that this rule is correct.

HARBOR AND LAND COMMISSIONERS — JURISDICTION OVER ICE CUTTING ON GREAT PONDS.

The Board of Harbor and Land Commissioners has no jurisdiction over the cutting of ice on great ponds, but, under R. L., c. 96, §§ 18 and 25, has authority to permit ice-harvesting structures to encroach on such ponds or to abate as nuisances structures erected without a license.

You have inquired whether your Board has any jurisdiction with reference to the cutting of ice on great ponds belonging to the Commonwealth.

To the Board
of Harbor and
Land Com-
missioners.
1914
March 11.

By the law of Massachusetts, great ponds, not appropriated before the Colony Ordinance of 1647 to private persons, are public property, the right of reasonably using and enjoying which, for taking ice for use or sale, as well as for fishing and fowling, boating, skating, and other lawful purposes, is common to all, and in the water or ice of which, or in the land under them, the owners of the shores have no peculiar rights, except by grant from the Legislature, or by prescription, which implies a grant. (*Hittinger v. Eames*, 121 Mass. 539, 546.)

It is too well settled to be disputed that the property in the great ponds is in the Commonwealth; that the public have the right to use them for fishing, fowling, boating, skating, cutting ice for use or sale, and other lawful purposes; and that the owners of the shores have no exclusive rights in them except by a grant of the Legislature. . . .

The right to cut ice is common to all the public. (*People's Ice Co. v. Wavenport*, 149 Mass. 322, 324.)

The right to cut ice therefrom for use or sale is common to all, and the owners of the shores have no peculiar right in the water or ice, or in the land under them, except by grant of the Legislature, or by prescription from which a grant is to be implied. (*Gage v. Steinkrauss*, 131 Mass. 222.)

Persons have "no peculiar title or right in the pond by virtue of being lessees of an ice house and land upon the shore." *Rowell v. Doyle*, 131 Mass. 474, 476.

I have been unable to find that there has been any delegation by the Legislature to your Board of the power to limit the public right to take ice from great ponds. By section 18 of chapter 96 of the Revised Laws your Board may authorize the encroachment on great ponds for the purpose of building structures to be used in ice taking, but such license would, of course, confer no exclusive right to take ice.

Under section 25 of said chapter your Board may abate as a nuisance any such structures erected without license. See *Attorney-General v. Ellis*, 198 Mass. 91.

BOARD OF REGISTRATION IN PHARMACY — CORPORATIONS —
DRUG STORES.

Under St. 1913, c. 705, § 4, a drug store, if managed by a registered pharmacist, may be owned by a corporation some of whose stockholders are not registered pharmacists.

To the State
Board of
Registration in
Pharmacy.
1914
March 13.

In your communication of recent date you state that "the Board of Registration in Pharmacy has been petitioned by the Massachusetts State Pharmaceutical Association to refuse permits to such new stores as have among their stockholders unregistered persons actively engaged in the business of pharmacy. See § 2, c. 720, Acts of 1913; also c. 705, Acts of 1913." And you add that "information is respectfully asked if the Board can comply with said petition, provided the store is under the direct supervision of a registered stockholder."

I take it that your inquiry relates to corporations that desire to open and keep open drug stores and that have among their stockholders persons who are not registered pharmacists but who are nevertheless actively engaged in the business of pharmacy.

It is difficult to understand, in view of the provisions of the law and the penalties involved, how any unregistered person can now be actively engaged in the business of pharmacy.

It may be well to consider just what that business is. "Pharmacy" is defined as meaning —

1. The art or practice of preparing, preserving, and compounding medicines, and of dispensing them according to the formulæ or prescriptions of medical practitioners.

2. The occupation of an apothecary or pharmaceutical chemist.

3. A place where medicines are prepared and dispensed; a drug store; an apothecary's shop. (*Century Dictionary*.)

It will be noted that the definition relates solely to drugs or medicines and the compounding and dispensing of the same,

and contains no reference to any one of the great number of articles of ordinary merchandise now to be found on sale in stores where the business of pharmacy or the drug business is carried on.

Section 1 of chapter 705 of the Acts of 1913 defines the term 'drug business' as used in that act as follows:—

The term "drug business" as used in this act shall mean the sale of opium, morphine, heroin, codeine or other narcotics, or any salt or compound thereof, or any preparation containing the same, or cocaine, alpha or beta eucaine, or any synthetic substitute therefor, or any salt or compound thereof, or any preparation containing the same, and the said term shall also mean the compounding and dispensing of physicians' prescriptions.

Said chapter further provides in sections 2, 3 and 4 as follows:—

SECTION 2. No store shall be kept open for the transaction of the retail drug business unless it is registered with and a permit therefor has been issued by the board of registration in pharmacy as herein provided.

SECTION 3. The board of registration in pharmacy shall, upon application, issue a permit to keep open a store for the transaction of the retail drug business to such persons, firms and corporations as the board may deem qualified to conduct such a store. The application for such a permit shall be made in such manner and in such form as the board shall determine. A permit issued as herein provided shall be exposed in a conspicuous place in the store for which the permit is issued and shall expire on the first day of January following the date of its issue. The fee for the permit shall be one dollar.

SECTION 4. No such permit shall be issued for a corporation to keep open a store for the transaction of the retail drug business, unless it shall appear to the satisfaction of the said board that the management of the drug business in such store is in the hands of a registered pharmacist.

The section last above quoted makes special provision in regard to permits to corporations and provides that no such permit shall be issued to a corporation unless it shall appear to the satisfaction of your Board that the management of the drug business in the store of the corporation is in the hands of a registered pharmacist.

In the sale of the stock of a corporation, some and possibly a

large part of it will naturally pass to the ownership of persons who are not registered pharmacists. The purpose of the statute is to protect the public from the dangers that would be occasioned by the compounding and dispensing of medicines and drugs by ignorant and unskilled persons. Under the provisions of section 4 above quoted it is clear that if and when it shall appear to the satisfaction of your Board that the management of the drug business in the store for which a permit is sought is in the hands of a registered pharmacist, the measure of safety required by the law has been attained and the provisions of the statute are satisfied. It is not to be expected that all the stockholders of a corporation, even though it be organized for the special purpose of carrying on the drug business, will be registered pharmacists; and the fact that some stockholder in such a corporation is unlawfully engaged in the drug business would not seem to be a sufficient reason for refusing a permit.

The Board of Registration in Pharmacy is, in my opinion, required under the statute of 1913 to act in good faith on each and every application made to it for a permit and to grant permits only to such persons, firms and corporations as it may deem qualified to conduct a store for the transaction of the retail drug business as defined in the statute.

CIVIL SERVICE — ASSISTANT ASSESSORS OF THE CITY OF
BOSTON.

St. 1913, c. 484, requiring appointments of first assistant assessors in the city of Boston to be subject to civil service, does not affect the provisions of St. 1894, c. 276, relating to assistant assessors other than first assistants.

To the
Civil Service
Commission.
1914
March 17.

You have requested my opinion upon the following questions: —

First. — Are section 13 of chapter 19 of the Revised Laws and chapter 276 of the Acts of 1894 inconsistent with the provisions of chapter 484 of the Acts of 1913, and therefore repealed?

Second. — If the above question is answered in the negative is there

any violation of said section 13 of chapter 19 of the Revised Laws if, in its endeavor to carry out the provisions of each of the above-mentioned acts relating to the appointment of assistant assessors, the Civil Service Commissioners make inquiries of the applicants as to their politics and certify to fill vacancies accordingly?

Chapter 276 of the Acts of 1894 provides as follows:—

In the city of Boston the assistant assessors shall be appointed in equal numbers from the two leading political parties, for each grade of assistant, and shall be assigned to the various assessment districts so that the assistant assessors assigned to any district shall equally represent such parties.

Section 13 of chapter 19 of the Revised Laws provides in part:—

No question in any examination shall relate to, and no appointment to position or selection for employment shall be affected by, political or religious opinions or affiliations.

Chapter 484 of the Acts of 1913 provides:—

SECTION 1. All appointments of first assistant assessors in the city of Boston shall be for an indeterminate period, and shall be subject to the civil service rules established under the provisions of chapter nineteen of the Revised Laws and acts in amendment thereof and in addition hereto.

SECTION 2. First assistant assessors in the city of Boston holding office at the time of the passage of this act shall continue to hold office as if appointed under this act.

SECTION 3. All acts or parts of acts inconsistent herewith are hereby repealed.

The intention of the Legislature in the enactment of chapter 484 of the Acts of 1913 was, first, to secure the retention in office of those then holding the positions of first assistant assessors of the city of Boston, and, second, to provide that appointments to those positions should in the future be made in accordance with the civil service law and the rules made in pursuance of that law by your commission. Chapter 276 of the Acts of 1894 and chapter 484 of the Acts of 1913 both have

relation to the city of Boston and to the office of first assistant assessors. The purpose and intention of the later enactment are certainly not consistent with the purpose of chapter 276 of the Acts of 1894, and therefore repeal the provisions of the earlier statute so far as that statute relates to the appointment of first assistant assessors. It is my opinion that this repeal goes no farther than the office of first assistant assessors, and that assistant assessors other than the first may be appointed by the mayor of Boston in accordance with the provisions of chapter 276 of the Acts of 1894. I am also of the opinion that the provisions of section 13 of chapter 19 of the Revised Laws are not affected or in any way modified by the provisions of chapter 484 of the Acts of 1913.

LABOR AND INDUSTRIES — SUCTION SHUTTLE.

The use of the suction shuttle in factories, by whatever device it is operated, is forbidden by St. 1911, c. 281, § 1.

To the State
Board of Labor
and Industries.
1914
March 17.

Your communication of March 10, as I understand it, requests my opinion upon the following question: May the proprietor of a cotton factory use the suction shuttle, so called, provided he furnishes the employee using the shuttle with a hook for threading it, making threading by suction unnecessary?

Section 1 of chapter 281 of the Acts of 1911 provides as follows:—

It shall be unlawful for any proprietor of a factory or any officer or agent or other person to require or permit the use of suction shuttles, or any form of shuttle in the use of which any part of the shuttle or any thread is put in the mouth or touched by the lips of the operator. It shall be the duty of the state board of health to enforce the provisions of this act.

The danger attending the use of shuttles of this type would be avoided by the use of a hook for threading them, but the Legislature regarded this type of shuttle as so objectionable

that it enacted that it should be unlawful for any proprietor of a factory or any officer or agent or other person to require or permit its use. A change in the method of using the shuttle in no way alters the statute. I am of the opinion that the use of the suction shuttle, by whatever device it is operated, is unlawful, and will be so until the statute is changed.

BOARD OF AGRICULTURE — PRIZES.

Under Res. 1913, c. 96, the State Board of Agriculture has authority to issue prizes, in its discretion, for the best system of farm bookkeeping and the best plan of a dairy barn.

You have requested my opinion upon the following question: To the State
Board of
Agriculture.
1914
March 17.
 Is the Dairy Bureau of the State Board of Agriculture empowered by chapter 96 of the Resolves of 1913 to award cash prizes for the best system of farm bookkeeping, open to the world, and for the best plan of a dairy barn, open to the world?

The evident purpose of this resolve is that stated in its title, — “to provide for the encouragement of dairying and the production of milk and dairy products of superior quality.” The resolve provides that this may be done by offering prizes: (1) for the best kept stables, (2) the lowest bacteria counts, (3) the best quality of milk, (4) or otherwise, as the Board may determine; (5) by demonstrations illustrating the best methods of dairying; (6) by agents who shall instruct the citizens of the Commonwealth in matters of stable construction and management and dairy methods in general; (7) by the distribution of literature giving information in regard to the best methods of dairying, and especially in regard to the production of clean milk; and (8) and lastly, “in such other manner as the Board may deem best for the encouragement of dairying and the production of clean milk.”

This resolve confers upon the Board of Agriculture authority to proceed in its own discretion, either by the means suggested herein or by such other means and methods as in its judgment will in the greatest degree make for the encouragement of

dairying and the production of milk and dairy products of superior quality. The only limitation upon the exercise of the discretion of the Board is the necessary one that applies to all cases of the kind, — that it be exercised in good faith.

The scope of the resolve under which you act in this matter is limited to the encouragement of dairying, etc. It may be a matter of serious consideration whether a system of farm book-keeping falls within the purpose of the resolve. However, as, in my opinion, your Board is the final judge of that question, I offer no further suggestion of my own upon this point.

It is my opinion that if the State Board of Agriculture, in the exercise of its discretion and judgment, believes the purposes sought by the enactment of chapter 96 of the Resolves of 1913 will be best served by awarding cash prizes for the best system of farm bookkeeping and for the best plan of a dairy barn, the competition to be open to the world, it has authority to offer and award such prizes.

ANNULMENT OF MARRIAGE — PAYMENT OF ALIMONY.

Courts cannot make provision for alimony upon annulment of marriage.

You have requested my opinion upon the following question: "In case of a petition for nullity of marriage does the court now have power to make provision for the support of the wife?"

The statute, R. L., c. 151, § 11, provides, among other things, that in suits for annulling a marriage a libel may be filed in the same manner as a libel for divorce and that "all the provisions of chapter one hundred and fifty-two relative to libels for divorce shall, so far as appropriate, apply to libels under the provisions of this section."

The real question, then, is, To what extent are the provisions of chapter 152, relative to decrees for the payment of alimony, appropriate to proceedings for the annulment of a marriage?

It may aid us in reaching a sound conclusion in regard to this matter if we consider briefly the character and results of actions for divorce and actions for nullity. The action for

divorce is based upon the fact of a valid marriage. The action for nullity is based upon the fact that there has been no valid marriage. In its consequences a sentence or decree of nullity differs materially from a decree of divorce. The latter assumes the validity of the marriage. If the marriage was not valid, no decree of divorce could be made, and the operation of the divorce is entirely prospective; while a decree of nullity is retroactive in that it renders the marriage void from the beginning and nullifies all its legal results. The parties are to be regarded as if no marriage had ever taken place. They are single persons, if they were single before. Their rights of property as between themselves are to be viewed as never having been affected by the marriage.

The right to alimony upon the granting of a decree of divorce from the bond of matrimony is purely statutory. At the common law, alimony was awarded only in those cases in which the marriage relation continued, that is, in cases of divorce from bed and board; and no alimony could be awarded upon a divorce from the bond of matrimony. *Davol v. Davol*, 13 Mass. 264; *Jones v. Jones*, 18 Me. 308.

Apart from any consideration of our statute, it may be said as a general proposition that a woman is not entitled to permanent alimony upon a sentence of nullity, although some authorities hold that she is entitled to alimony *pendente lite*. Bishop on Marriage, Separation and Divorce, § 1597.

This question does not appear to have been passed upon by our Supreme Judicial Court, the nearest approach to it being found in the case of *Adams v. Holt*, 214 Mass. 77. It is worthy of note that counsel for the wife in this case, being confronted with the question you have propounded and having occasion to give it most careful consideration, evidently concluded that a claim for alimony could not be sustained and therefore asked for compensation for services, which was refused.

In rendering its decision in the case just referred to the court said: —

It has been held that relief in the nature of alimony cannot be afforded except as an incident in connection with a divorce.

And cited *Adams v. Adams*, 100 Mass. 365; *Parker v. Parker*, 211 Mass. 139.

To the same effect are the cases of *Page v. Page*, 189 Mass. 85, and *Shannon v. Shannon*, 2 Gray, 285.

While these cases may be said not to be absolutely conclusive in regard to the question before me, inasmuch as none of them presented precisely the same issue, still, the trend of the Massachusetts decisions referred to, when taken into consideration with the essential differences between an action for divorce and an action for annulment of marriage, the difference in results between decrees for divorce and decrees of nullity, and the fact that alimony is incident to suits for divorce and is not incident to suits of nullity, is certainly sufficient to create very grave doubt as to whether alimony can be granted in an action of nullity.

I am of the opinion that the provisions of our statute in regard to alimony are not appropriate to an action of nullity, and that for this reason the court in actions of nullity cannot make provision for the support of the wife. The question is not, however, free from difficulty, and the bill submitted with your question would undoubtedly clear this question of all doubt and uncertainty.

CONSTITUTIONAL LAW — LIBERTY OF THE PRESS — PUBLICATION OF NAMES OF DRUGS TAKEN WITH SUICIDAL INTENT.

A law prohibiting the publication of the name of any drug, chemical, etc., taken with suicidal intent would be unconstitutional as interfering with the liberty of the press.

To the
Committee on
the Judiciary.
1914
March 24.

You have requested my opinion as to whether House Bill No. 1145, if enacted, would be constitutional.

The proposed bill reads as follows: —

Whoever publishes, or causes to be published, in any newspaper or magazine, or in any other public manner, the name of any drug, chemical, or medicinal preparation when the same has been taken by any person with suicidal intent, or when any such drug, chemical or medicinal preparation has been intentionally or unintentionally administered

or applied to any human being or beast, shall be punished by a fine of not less than ten dollars and not more than one hundred dollars, or shall be imprisoned in a jail or house of correction for a term not exceeding one year, or shall be punished by both such fine and imprisonment.

The question presented is whether this bill, if enacted, will be an unlawful interference with the liberty of the press.

By the first amendment of the Constitution of the United States the liberty of the press is secured against restraint, it being provided that Congress shall make no law abridging freedom of speech or of the press. The Constitution of this Commonwealth, by Article XVI. of the Declaration of Rights, secures the liberty of the press in the following language: —

The liberty of the press is essential to the security of freedom in a state: it ought not, therefore, to be restrained in this commonwealth.

Notwithstanding the fact that the liberty of the press is thus secured against restraint, it is true that it is a right that may not be abused. He who uses it is responsible for its abuse.

The liberty of the press, not its licentiousness, is the construction which a just regard to the other parts of the Constitution and to the wisdom of those who framed it, requires. (*Commonwealth v. Blanding*, Pick. 304.)

That the licentiousness of the press, not its liberty, may be restrained by the exercise of the police power seems to be well settled; as, in the familiar instances forbidding the publication and sale of a newspaper devoted to the publication of scandal and immorality, prohibiting blasphemous publications, excluding obscene matter from the mails, and various other enactments. It has ever been the aim of our government to maintain and preserve to the press the full enjoyment of the right secured it by the Constitution and to restrain and prevent the abuse of that right. Our problem is to determine how far this right extends; to locate the line of demarcation at which liberty lives off and license begins.

It may be said by way of premise that the phrase "liberty of the press" includes a great deal more than the right to discuss

freely political and governmental questions. It is a right the enjoyment of which is not confined solely to those who publish books, pamphlets and periodicals. It embodies the right of every individual citizen to be informed. Liberty of speech and of the press is the liberty to know, to utter, to publish and to argue freely upon all questions of public interest, whether political, religious, social, moral, literary, scientific, industrial or financial. Necessarily the field of usefulness and of responsibility of the press increases with every advance of human knowledge. The position occupied by the press in the modern social and business world has been well described and its legal limitations to a great degree indicated by Judge Cooley in his work on Constitutional Limitations, wherein, speaking of the press, he says: —

Through it, and by means of the electric telegraph, the public proceedings of every civilized country, the debates of the leading legislative bodies, the events of war, the triumphs of peace, the storms in the physical world, and the agitations in the moral and mental, are brought home to the knowledge of every reading person, and, to a very large extent, before the day is over on which the events have taken place. And not public events merely are discussed and described, but the actions and words of public men are made public property; and any person sufficiently eminent or notorious to become an object of public interest will find his movements chronicled in this index of the times. Every party has its newspaper organs; every shade of opinion on political, religious, literary, moral, industrial, or financial questions has its representative; every locality has its press to advocate its claims and advance its interests, and even the days regarded as sacred have their special papers to furnish reading suitable for the time. The newspaper is also the medium by means of which all classes of the people communicate with each other concerning their wants and desires, and through which they offer their wares and seek bargains. As it has gradually increased in value, and in the extent and variety of its contents, so the exactions of the community upon its conductors have also increased, until it is demanded of the newspaper publisher that he shall daily spread before his readers a complete summary of the events transpiring in the world, public or private, so far as those readers can reasonably be supposed to take an interest in them; and he who does not comply with this demand must give way to him who will.

The newspaper is also one of the chief means for the education of the

people. The highest and the lowest in the scale of intelligence resort to its columns for information; it is read by those who read nothing else, and the best minds of the age make it the medium of communication with each other on the highest and most abstruse subjects.

The proposed bill, if enacted, will certainly trench upon some of the functions of a free press as described in the passage last above quoted. It will prohibit to some extent the spread of information beneficial to many people by showing them what to avoid in the use of drugs, chemicals and medicinal preparations. It will tend, also, to prevent the dissemination not only of knowledge about poisons but of their antidotes as well. Its effect will be to prevent in some measure the publication of those precautionary suggestions that appear in the press in cases where poison is administered or taken by mistake, — suggestions that are really useful to many members of society. If it be said that some misguided or weak-minded persons make bad use of the information contained in publications which it is the purpose of this bill to prevent, the answer is that every kind of useful knowledge is at times misused and abused, to the great injury of individuals and of the community.

This measure must be considered in the light of the rule that—

The constitutional liberty of speech and of the press, as we understand it, implies a right to freely utter and publish whatever the citizen may please, and to be protected against any responsibility for so doing, except so far as such publications, from their blasphemy, obscenity, or scandalous character, may be a public offence, or as by their falsehood and malice they may injuriously affect the standing, reputation, or pecuniary interests of individuals. (Cooley on Constitutional Limitations, 5th ed., p. 521.)

Entertaining no doubt whatever that the press may be held in check whenever its publications violate the rule above stated, I am of the opinion that the measure you have submitted to me is obnoxious to the provisions of the Constitution securing the liberty of the press and that, if enacted, it would be unconstitutional.

and instructions, either with penalties or without; so as the same be not repugnant or contrary to this constitution, as they shall judge to be for the good and welfare of this commonwealth, and for the government and ordering thereof, and of the subjects of the same."

In the exercise of the authority vested in it by the Constitution, the Legislature has provided for the laying out and construction of public ways, either by means of authority conferred upon a commission of the Commonwealth, as the State Highway Commission, or, in some instances, county commissioners, or by authority conferred upon cities and towns. It would seem to be too late to question the general authority of the Legislature to regulate the use of the highways in Massachusetts. Generally speaking, the highways within and through the State are in fact constructed by authority of the State itself, and it has full power to provide all proper regulations of police to govern the action of persons using them. Cooley on Constitutional Limitations, 7th ed., p. 860.

In this Commonwealth the Legislature has always exercised its authority in such manner as seemed necessary or proper to regulate the use of the highways. Among the familiar instances of such legislative regulation are: the law of the road that when persons meet on a bridge or way, traveling with carriages, wagons, carts, sleds, sleighs, bicycles or other vehicles, each shall seasonably drive his carriage to the right; that the driver of a carriage or other vehicle passing a carriage or other vehicle traveling in the same direction shall drive to the left; that no person shall travel on a bridge or way with a sleigh or sled drawn by a horse unless there are at least three bells attached to some part of the harness (R. L., c. 54, §§ 1, 2 and 3); that the driver of every vehicle on a bridge or way, public or private, where there is not an unobstructed view of the road for at least one hundred yards shall keep his vehicle on the right of the middle of the traveled part of such bridge or way. (St. 1908, c. 512, § 1.) So, too, it was long ago held that the speed of travel may be regulated with a view to safe use and general protection and to prevent a public nuisance. *Common-*

wealth v. Worcester, 3 Pick. 461; *Commonwealth v. Stodder*, 2 Cush. 562. And the Legislature has provided that one may not allow his beasts to run at large on a public way. *Commonwealth v. Curtis*, 9 Allen, 266. The riding of bicycles on sidewalks is prohibited. R. L., c. 52, §§ 9, 10, 11 and 12. The construction of bicycle paths in the highway and the reservation of spaces for the use of horseback riders in certain parts of public ways has been authorized. R. L., c. 48, § 45.

The Legislature has power to authorize, and has authorized, certain obstructions in highways which would otherwise be a public nuisance, such as the laying of railroad tracks. *Commonwealth v. Old Colony & Fall River R.R. Co.*, 14 Gray, 93; *Springfield v. Connecticut River R.R. Co.*, 4 Cush. 71. And the Legislature may grant a power to take land already appropriated and in use as a public way for another public use. *Springfield v. Connecticut River R.R. Co.*, *supra*; *Boston v. Brookline*, 156 Mass. 172; *Newton v. Newton*, 188 Mass. 226.

Many other instances of the exercise of legislative authority in the control and regulation of the use of highways might be cited.

Legislation has also been enacted directly regulating the use of automobiles and motor vehicles on public ways and also authorizing various boards, towns and cities to make by-laws and ordinances in regard thereto; and the constitutionality of this legislation has been sustained by the Supreme Judicial Court. An instance of legislation of this kind is to be found in chapter 203 of the Acts of 1907, which provides that —

Any person who operates an automobile or motor vehicle, and any owner of an automobile who permits such machine to be operated in or over any highway or private way laid out under authority of law or otherwise, from which automobiles or motor vehicles are excluded, provided notice of such exclusion is conspicuously posted at the entrance to such way, shall be liable to any or all of the provisions and penalties provided in section nine of chapter four hundred and seventy-three of the acts of the year nineteen hundred and three, as amended by section three of chapter four hundred and twelve of the acts of the year nineteen hundred and six, for violation of the laws regulating the use of automobiles and the conduct of operators thereof.

and instructions, either with penalties or without; so as the same be not repugnant or contrary to this constitution, as they shall judge to be for the good and welfare of this commonwealth, and for the government and ordering thereof, and of the subjects of the same."

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This act has been re-enacted in and superseded by section 15 of chapter 534 of the Acts of 1909, and is now in force. Its operation on the island of Nantucket may, however, be prevented by the proviso contained in section 17 of said chapter, that —

No ordinance, by-law or regulation now in force upon the island of Nantucket relating to the use or operation of motor vehicles shall be affected by the provisions of this act.

I have not before me the ordinances or by-laws of the town of Nantucket, and am therefore unable to say whether this section is in force in Nantucket or not.

In the case of *Commonwealth v. Kingsbury*, 199 Mass. 542, the constitutionality of chapter 203 of the Acts of 1907 and of the sections therein referred to came into question. Acting under the provisions of this statute the selectmen of Ashfield duly posted notices excluding automobiles from certain highways within their jurisdiction, and the defendant, disregarding the notices, drove his automobile upon and over one of the ways thus posted and from which automobiles were excluded. In its discussion of the constitutional right of the Legislature to enact such a law the court said: —

Automobiles are vehicles of great speed and power, whose appearance is frightful to most horses that are unaccustomed to them. The use of them introduces a new element of danger to ordinary travellers on the highways, as well as to those riding in the automobiles. In order to protect the public great care should be exercised in the use of them. Statutory regulation of their speed while running on the highways is reasonable and proper for the promotion of the safety of the public. It is the duty of the Legislature, in the exercise of the police power, to consider the risks that arise from the use of new inventions applying the forces of nature in previously unknown ways. The general principle is too familiar to need discussion. It has been applied to automobiles in different States with the approval of the courts. *Commonwealth v. Boyd*, 188 Mass. 79. *Christy v. Elliott*, 216 Ill. 31. *People v. Schneider*, 139 Mich. 673. *People v. MacWilliams*, 86 N. Y. Supp. 357.

It seems too plain for discussion that, with a view to the safety of the public, the Legislature may pass laws regulating the speed of such machines when running upon highways. The same principle is applicable

to a determination by the Legislature that there are some streets and ways on which such machines should not be allowed at all. In some parts of the State, where there is but little travel, public necessity and convenience have required the construction of ways which are steep and narrow, over which it might be difficult to run an automobile, and where it would be very dangerous for the occupants if automobiles were used upon them. In such places it might be much more dangerous for travellers with horses and with vehicles of other kinds if automobiles were allowed there. No one has a right to use the streets and public places as he chooses, without regard to the safety of other persons who are rightly there. In choosing his vehicle, every one must consider whether it is of a kind which will put in peril those using the streets differently in a reasonable way. In parks and cemeteries and private grounds, where narrow roads with precipitous banks are sometimes constructed for carriages drawn by horses, it has been a common practice to exclude automobiles altogether, chiefly because of the danger of their frightening horses.

The general principle referred to was applied long ago to a different kind of vehicle, in *Commonwealth v. Stodder*, 2 Cush. 562, a case which relates to an ordinance of the city of Boston, prescribing the streets on which certain omnibuses might be run and excluding them from other streets. . . .

The right of the Legislature, acting under the police power, to prescribe that automobiles shall not pass over certain streets or public ways in a city or town, seems to us well established both upon principle and authority.

So far, then, as the power and authority of the Legislature is concerned, I am of the opinion that the proposed bill is within the provisions of the Constitution.

It may, however, be urged that the power of the Legislature to regulate the use of highways cannot be delegated to a board of selectmen. This question also has been discussed by the Supreme Judicial Court. It received very full consideration in the case of *Brodvine v. Revere*, 182 Mass. 598. In that case the question at issue was as to the constitutionality of section 3 of chapter 288 of the Acts of 1894, conferring authority upon the Metropolitan Park Commissioners to make rules and regulations for the government and use of the roadways or boulevards under their care, "breaches whereof shall be breaches of the peace and punishable as such in any

court having jurisdiction of the same." It was contended that this was an unconstitutional attempt to delegate legislative power. In speaking of this question the court said:—

It is well established in this Commonwealth and elsewhere that the Legislature cannot delegate* the general power to make laws conferred upon it by a Constitution like that of Massachusetts. (Citing numerous authorities.)

The court further said:—

This doctrine is held by the courts almost universally.

There is a well-known exception to it, resting upon conditions existing from ancient times in most of the older States of the Union, which the Constitutions of the States generally recognize, namely, the existence of town or other local governmental organizations which have always been accustomed to exercise self-government in regard to local police regulations and other matters affecting peculiarly the interests of their own inhabitants. On this account the determination of matters of this kind has been held to be a proper exercise of local self-government which the Legislature may commit to a city or town. *Commonwealth v. Bennett*, 108 Mass. 27. *Stone v. Charlestown*, 114 Mass. 214. *Opinion of the Justices*, 160 Mass. 586. *People v. Albertson*, 55 N. Y. 50. *Gloversville v. Howell*, 70 N. Y. 287. *State v. Morris County*, 7 Vroom, 72. . . . It is very clear, where the people of a city or town have become so numerous that the management of their municipal affairs can be conducted conveniently only by a representative body like a city council, that municipal legislation, such as making ordinances and regulations as to local matters affecting the health, safety, and convenience of the people, may be intrusted to the people's chosen representatives in a city government. Hence city councils are usually authorized to pass ordinances, as voters of towns adopt by-laws. In this Commonwealth legislation has gone further than this. Apparently on grounds of expediency amounting almost to necessity, the making of rules and regulations for the preservation of the public health has been intrusted to boards of health in towns as well as in cities, and to a State board of health, and a violation of the rules established by city or town boards has long been and is now punishable in the courts. . . . The validity of these statutes, which has long been recognized, stands upon one or both of two grounds. They may be considered as being within the principle permitting local self-government as to such matters, the board of health being treated as properly representing the inhabitants in making regulations, which often are needed at short notice and which could not well be made, in all kinds of cases, by the voters in town meetings assembled. Perhaps some of these statutes

may also be justified constitutionally on the ground that the work of the board of health is only a determination of details in the nature of administration, which may be by a board appointed for that purpose, and that the substantive legislation is that part of the statute which prescribes a penalty for the disobedience of the rules which they make as agents performing executive and administrative duties.

Again the court says:—

There is also a strong ground for the contention that the quoted language of the statute simply leaves to the board the administration of details which the Legislature cannot well determine for itself, and which it may therefore leave to the determination of a subordinate tribunal, and that the substance of the legislation is found in that part of the statute which prescribes punishment for disregard of the regulations so determined.

This decision is cited with approval in *Commonwealth v. Kingsbury*, 199 Mass. 542. See, also, *Crowninshield v. Crowninshield*, 187 Mass. 221; *Nelson v. State Board of Health*, 186 Mass. 330.

The authorities above cited seem quite sufficient to show the authority and power of the Legislature to control and regulate the use of the highways of the Commonwealth, and that the Legislature may in the exercise of its discretion confer upon towns or other local governmental organizations matters affecting peculiarly the interests of their own inhabitants and matters of local police regulation.

I note further that the proposed bill, subject to a limitation as to general laws now or hereafter in force and as to the minimum fee to be charged for a license under it, leaves the amount of license fee and the provisions of the license to be fixed by the selectmen of Nantucket. Legislation of this precise character, so far as the fixing of license fee is concerned, was considered by the Supreme Judicial Court and its constitutionality sustained in the case of *Boston v. Schaffer*, 9 Pick. 415. In that case it was urged that a statute granting authority to the mayor and aldermen of the city of Boston to license theaters "on such terms and conditions as to them may seem just and reasonable" was unconstitutional; but the court held

the statute to be valid and sustained the action taken by the mayor and aldermen of Boston under its provisions.

In the consideration of this proposed measure of legislation I must and do assume that the Legislature, in its passage (if it is passed), judged its enactment to be for the good and welfare of the Commonwealth and that the action of the selectmen of Nantucket, in determining the provisions of the license and the amount of the license fee, will be reasonable.

I am of the opinion that the proposed bill, if enacted, will be constitutional.

TRUST COMPANIES — USE OF WORD "BANK" AS PART OF BUSINESS NAME.

There is no statutory prohibition of the use of the word "bank" as a part of the business name of a trust company.

To the Bank
Commissioner.
1914
March 31.

You request my opinion upon the following question: —

A trust company incorporated under the laws of this Commonwealth, and acting under chapter 116 of the Revised Laws, wishes to change its name so that it will be known as a bank and trust company.

Will you please advise me if, in your opinion, a trust company by using the word "bank" as part of its name would be conflicting with the laws under which it is operating. Also would it be in conflict with chapter 115 of the Revised Laws if a trust company which is operating under another statute should designate itself as a bank.

Section 3 of chapter 116 of the Revised Laws, as amended by section 1 of chapter 491 of the Acts of 1909, provides in part: —

No person or association and no bank or corporation, except trust companies incorporated as such in this commonwealth, shall use in the name or title under which his or its business is transacted the words "Trust Company" even though said words may be separated in such name or title by one or more other words, or advertise or put forth a sign as a trust company or in any way solicit or receive deposits as such.

Section 16 of chapter 590 of the Acts of 1908, as amended by section 4 of chapter 491 of the Acts of 1909, provides: —

No corporation, either domestic or foreign, and no person, partnership or association except savings banks and trust companies incorporated under the laws of this commonwealth, or such foreign banking corporations as were doing business in this commonwealth and were subject to examination or supervision of the commissioner on June first, nineteen hundred and six, shall hereafter make use of any sign at the place where its business is transacted having thereon any name, or other word or words indicating that such place or office is the place or office of a savings bank. Nor shall such corporation, person, partnership or association make use of or circulate any written or printed or partly written and partly printed paper whatever, having thereon any name, or other word or words, indicating that such business is the business of a savings bank; nor shall any such corporation, person, partnership or association, or any agent of a foreign corporation not having an established place of business in this commonwealth, solicit or receive deposits or transact business in the way or manner of a savings bank, or in such a way or manner as to lead the public to believe, or as in the opinion of the commissioner might lead the public to believe, that its business is that of a savings bank. Nor shall any person, partnership, corporation or association except co-operative banks incorporated under the laws of this commonwealth and corporations described in the first sentence of this section hereafter transact business under any name or title which contains the words "bank" or "banking," as descriptive of said business.

The statutes seem to prohibit the use of the name "trust company" by any but a corporation that is in fact a trust company, but also seem to contemplate the possible use of other words as a part of the name of the corporation in combination with the words "trust company." There is a real distinction between a bank and a trust company, although many of the functions of the two kinds of corporations are the same. I do not, however, find any prohibition of the use of the word "bank" in connection with the words "trust company," and am of the opinion that the word "bank" may be used as part of the corporate name with the words "trust company," so far as any strictly legal question is concerned. Whether as a matter of policy the use of the name ought to be permitted is not for the consideration of this department.

CONSTITUTIONAL LAW — TAXATION OF INDUSTRIES — EX-EMPTIONS.

A law exempting manufacturing property from taxation for a term of years when authorized by local authorities would be unconstitutional.

To the House
of Repre-
sentatives.
1914
April 3.

You have requested my opinion upon the constitutionality of House Bill No. 1386, which amends chapter 12 of the Revised Laws by inserting after section 6 thereof the following sections: —

SECTION 7. The voters of any city or town may vote to exempt, or may authorize the city or town council or board of aldermen of such city or town to exempt from taxation for a period not exceeding ten years, such manufacturing property as may thereafter be located in said city or town in consequence of such exemption, and the land on which such property is located.

SECTION 8. Property so exempted under the preceding section shall not, during such period of exemption, be liable to taxation while such property is used for the purposes for which it was so located.

By the Constitution of the Commonwealth, Part Second, Chapter I., Section I., Article IV., the General Court is empowered —

To impose and levy proportional and reasonable assessments, rates, and taxes, upon all the inhabitants of, and persons resident, and estates lying, within the said commonwealth; and also to impose and levy reasonable duties and excises upon any produce, goods, wares, merchandise, and commodities, whatsoever, brought into, produced, manufactured, or being within the same; . . .

And while the public charges of government, or any part thereof, shall be assessed on polls and estates, in the manner that has hitherto been practised, in order that such assessments may be made with equality, there shall be a valuation of estates within the commonwealth, taken anew once in every ten years at least, and as much oftener as the general court shall order.

These are the only provisions of the Constitution directly affecting the subject of taxation. The Constitution contains certain provisions in regard to taxation for specific purposes, recognizing the importance of the public worship of God and

of instruction in piety, religion and morality, and also in regard to the encouragement of literature and science, the diffusion of education among the people, and the promotion of general benevolence and public and private charity.

It is said that —

As taxation of the people may be imposed for these objects, property used for literary, educational, benevolent, charitable or scientific purposes may well be exempted from taxation. Such exemptions do not prevent the taxation of the people from being proportional and equal. (*Opinion of the Justices*, 195 Mass. 607.)

The general purpose of the constitutional provision above quoted is to put the burdens of government equally upon all the people, in proportion to their ability to bear them. (*Opinion of the Justices, supra.*)

To exempt a new industry from taxation, as provided in this proposed bill, would in some, and probably in many, instances result, in effect, in taxing an old established industry to aid in establishing a competitor in business. The exemption of any property from taxation results in the disproportionate taxation of other property in the same taxing district, and, as the Constitution permits only proportional taxation, all property within the Commonwealth which is owned and held in such a way that it ought to be available to its owner to increase his ability and enlarge his duty in defraying the expenses of the government must be subjected by law to the annual tax levy.

The statute exempting property from taxation is unconstitutional unless it applies only to property already taxed in some other way, or to property devoted to a public or semi-public use, or to property of insignificant value and of such a character that it may be supposed to be owned by every one alike. (Nichols on Taxation in Massachusetts, § 39.)

The result of my examination of the Constitution and the authorities under it is that I am of the opinion that this bill will, if enacted, be unconstitutional.

TREASURER AND RECEIVER-GENERAL — BONDS — NAMES OF
PURCHASERS.

The Treasurer and Receiver-General is not required to disclose the names of purchasers of State bonds.

To the
Treasurer and
Receiver-
General.
1914
April 3.

You ask my opinion upon the following question: Is the State Treasurer required by any existing law, or is it proper for him, to disclose the names and addresses of purchasers of tax-exempt State bonds?

I have to say that while it might under some circumstances become the right of the State Auditor to demand such information, when it would also become the duty of the Treasurer and Receiver-General to give it, and while the Governor and Council would, in my opinion, have authority to demand and receive such information, I am clearly of the opinion that there is no law requiring that names of purchasers of tax-exempt bonds from the State Treasurer and Receiver-General be made public.

Your question goes further and requests my opinion as to the propriety of making such disclosure. While this is somewhat beyond the scope of my duties, I may say that, inasmuch as the bonds are tax-exempt, there seems to be no reason why the general public should be informed as to who the purchasers of these securities may be. The publication of a list of names and addresses of the purchasers could be useful only to intermeddlers, curiosity seekers and those who are generally busy with other men's matters. I think no bonding house would disclose the names of its customers and that to publish a list of names would be to disturb the confidence that ought to exist between buyer and seller in a matter of this kind. If these bonds were taxable, and a question should arise as to giving information to local boards of assessors, an entirely different question would be presented.

CLERKS OF COURT — NATURALIZATION FEES.

Clerks of court are entitled only to such portion of the naturalization fees as is necessary for additional clerical assistance, travel and other expenses while acting under the naturalization act.

You have requested my opinion upon the following question: Have clerks of courts the right to retain for their own use and benefit one-half of the naturalization fees, under the naturalization laws of the United States and the laws of this Commonwealth?

To the
Controller of
County
Accounts.
1914
April 3.

Section 37 of chapter 165 of the Revised Laws provides that —

The annual salaries of clerks (meaning clerks of courts) shall be in full compensation for all services rendered by them in the civil or criminal courts, to the county commissioners, in making any returns required by law or in the performance of any other official duty except for such clerical assistance as may be allowed under the provisions of the following section.

It is clearly the meaning of this section that the salaries of clerks of courts are to be in full compensation for their official services. This section is supplemented by chapter 253 of the Acts of 1908, which makes elaborate provision for the keeping of an exact account of all fees received by clerks of courts or by any assistant or other person in their offices or employment, for any acts done or services rendered in connection with their said offices, and provides that they shall, on or before the tenth day of each month, pay over to the treasurer of the county, or to such other officer as may be entitled to receive them, all fees received during the preceding calendar month, and shall render an account thereof under oath, but subject to the proviso that —

The said clerks may retain that part of any moneys received by them under or by authority of the naturalization laws of the United States which they shall certify under oath to the treasurers of their respective counties have actually been expended by them for clerical assistance, travel and other expenses, while acting under said laws.

The United States naturalization act of June 29, 1906, provides —

That exclusive jurisdiction to naturalize aliens as citizens of the United States is hereby conferred upon the following specified courts:

United States circuit and district courts now existing . . . ; also all courts of record in any State or territory now existing, or which may hereafter be created, having a seal, a clerk, and jurisdiction in actions at law or equity, or law and equity, in which the amount in controversy is unlimited.

It is further provided in section 13 of that act —

That the clerk of each and every court exercising jurisdiction in naturalization cases shall charge, collect, and account for the following fees in each proceeding:

.

The clerk of any court collecting such fees is hereby authorized to retain one-half of the fees collected by him in such naturalization proceeding; the remaining one-half of the naturalization fees in each case collected by such clerks, respectively, shall be accounted for in their quarterly accounts, which they are hereby required to render the Bureau of Immigration and Naturalization, and paid over to such Bureau within thirty days from the close of each quarter in each and every fiscal year. . . .

In addition to the fees herein required, the petitioner shall, . . . deposit with and pay to the clerk of the court . . . *Provided*, That the clerks of courts exercising jurisdiction in naturalization proceedings shall be permitted to retain one-half of the fees in any fiscal year up to the sum of three thousand dollars.

.

The question, then, is, may clerks of courts of this Commonwealth having jurisdiction in naturalization cases, notwithstanding the provisions of our statute that their salaries shall be in full compensation for their services and that they must account for and pay over all fees as above set forth, retain for their own emolument one-half the naturalization fees received by them, less the amount actually paid by them for clerical assistance, travel and other expenses while acting under the naturalization laws?

The apparent conflict of laws has been productive of some contrariety of opinion. Under date of May 24, 1907, Hon. Dana Malone, then Attorney-General, rendered an opinion on this question to the effect that —

Clerks of courts cannot retain for their own use one-half of said naturalization fees received by them under the naturalization laws of the United States, as their duties and powers are prescribed by the laws of this Commonwealth, and they perform the duties required by the United States naturalization act by virtue of their offices as clerks of courts of this Commonwealth, and not through appointment by the United States, and our law especially requires that all naturalization fees be paid over to the treasurer of the county.

The same question arose in the case of *Hampden County v. Robert O. Morris*, 207 Mass. 167, and the Supreme Judicial Court decided that clerks of courts may retain one-half of the naturalization fees received by them, first paying from these fees for all additional clerical force required in performing the duties imposed by the naturalization act.

Under date of Jan. 5, 1914, the Supreme Court of the United States handed down a decision, covering the precise point under consideration, in the case of *Mulcrevy et al. v. City and County of San Francisco*. The plaintiff in error was elected county clerk and became ex officio clerk of the Superior Court, a court having jurisdiction of naturalization cases. The city charter under which he was elected provided that "the salaries provided in this charter shall be in full compensation for all services rendered." In its opinion the court said:—

On the merits the case presents no difficulty. It involves only the construction of the act of Congress already referred to above. We accept the State court's construction of the charter of the city and county of San Francisco. Indeed, its clearness leaves no room for construction. The salary it provides is declared to be "in full compensation for all services rendered." And it is provided that "every officer shall pay all moneys coming into his hands as such officer, no matter from what source derived or received, into the treasury of the city and county." The provisions are complete and comprehensive, and express Mulcrevy's contract with the city, the performance of which his office imposed upon him; and, of course, the fees received by him in naturalization proceedings, because he was clerk of the Superior Court, were in compensation for official acts, not personal acts.

. . . If it be granted that he was made an agent of the national government, his relations to the city were not thereby changed. He was still its officer, receiving fees because he was — not earning them other-

wise or receiving them otherwise, but under compact with the city to pay them into the city treasury within twenty-four hours after their receipt.

. . . He was given office accommodations, clerks to assist him, and yet contends that notwithstanding such equipment and assistance, notwithstanding his compact, he may retain part of the revenues of his office as fees for his own personal use. We cannot yield to the contention; nor do we think the act of Congress compels it. The act does not purport to deal with the relations of a State officer with the State. To so construe it might raise serious questions of power, and such questions are always to be avoided. We do not have to go to such lengths. The act is entirely satisfied without putting the officers of a State in antagonism to the laws of the State—the laws which give them their official status. It is easily construed and its purpose entirely accomplished by requiring an accounting of one-half of the fees to the United States, leaving the other half to whatever disposition may be provided by the State law. Counsel cite some State decisions which have construed the act of Congress as giving a special agency to the clerks of the State courts, and as receiving their powers and rights from the national enactment. The reports of the Department of Commerce and Labor are quoted from, which, it is contended, exhibit by their statistics and recommendations the necessity of national control. State decisions expressing a contrary view are frankly cited. This contrariety of opinion we need not further exhibit by a review of the cases. We have expressed our construction of the act, and it is entirely consonant with the purpose of the act and national control over naturalization.

The Supreme Judicial Court of this Commonwealth has always recognized the Supreme Court of the United States as the final arbiter as to the meaning of Federal statutes and as to questions arising under the Federal Constitution. *Commonwealth v. People's Express Co.*, 201 Mass. 564.

This principle is now universally accepted throughout the country, and in one form or another has received the sanction of our Supreme Judicial Court in numerous instances. *Braynard v. Marshall*, 8 Pick. 194; *Sims's Case*, 7 Cush. 285; *Eliot v. McCormick*, 144 Mass. 10; *Chesley v. Nantasket Beach Steamboat Co.*, 179 Mass. 469; *Opinion of the Justices*, 207 Mass. 601; *Opinion of the Justices*, 208 Mass. 619; *Commonwealth v. Phelps*, 210 Mass. 78.

A decision of the Supreme Court of the United States as to

the meaning of a Federal statute is a declaration of the law of the land, binding upon judges of State courts and upon individual citizens, and stands as such until overruled or modified by the court that made it, or until the law is changed by the legislative arm of the Federal government.

I am therefore of the opinion that clerks of courts are not entitled to retain any portion of the naturalization fees that may be paid to them, except, as specified in the statute, to pay for additional clerical assistance, travel and other expenses while acting under the naturalization act.

CONSTITUTIONAL LAW — GRADE CROSSINGS — POWERS OF LEGISLATURE.

The Legislature has authority to fix the time for the filing of a report by a grade crossing commission.

The Senate has transmitted to me an order which reads as follows: —

To the Senate.
1914
April 3.

Whereas, There is pending in the Senate a resolve to expedite the filing of a report relative to the abolition of the grade crossing in the center of the town of Winchester, printed as House Document No. 214; and

Whereas, There is a question as to whether this resolve is not an interference by the legislative power with the judicial power, within the terms of Article XXX of the Declaration of Rights; it is therefore

Ordered, That the opinion of the Attorney-General be requested by the Senate as to whether this resolve, if enacted, will be constitutional.

The powers and duties of the court with relation to the pending grade crossing matter —

belong to that class not strictly judicial, but partaking both of the judicial and the executive character, like those of laying out highways and assessing damages therefor, superintending the administration and distribution of the estates of insolvent debtors, and many others which might be named, the exercise and control of which may be vested by the Legislature at its discretion, unless restrained by specific constitutional provisions, either in judges appointed by the Governor and holding during good behavior, or in commissioners or other officers appointed or

elected in such manner and holding for such terms as the Legislature may prescribe. (*New London Northern R. R. v. Boston & Albany R. R.*, 102 Mass. 386, 387.)

As the whole subject of the crossing of highways by railroads can from time to time be regulated by the Legislature, the Legislature can, even after a final decree has been rendered, make other provisions, and require the crossings to be constructed in a manner different from that established by the decree. The Legislature can amend the statutes under which this proceeding has been commenced, and if the amended act is made applicable to the pending proceeding and is valid, the court in rendering a final decree must proceed in accordance with the statutes as amended. (*In re Northampton*, 158 Mass. 299, 302.)

If it is to be treated as special legislation prescribing new rules and additional provisions for making a public improvement in substitution for those under which the court and commissioners have been acting, it was within the power of the Legislature to enact it. (*Providence Steamboat Co. v. Fall River*, 183 Mass. 535, 540.)

Thus the Legislature has full jurisdiction of grade crossing matters, except that it may not direct what order or finding shall be made by the court or a commission. But the Legislature may make an order or finding which the court or a commission could have made in a matter pending and may direct the court to proceed as though the court or commission had made the order or finding. This is a fine distinction, as was pointed out in the dissenting opinions in the above quoted cases. Nevertheless, it is apparently law.

A statute setting the time for the report of the commission may be construed as an amendment to, or as a substitute for part of, section 36 of Part I. of chapter 463 of the Acts of 1906, and as such may be supported under the principles laid down in the above quoted cases.

It is therefore my opinion that the resolve in question would be constitutional.

SCHOOLHOUSES — USE FOR MUNICIPAL AND OTHER PURPOSES
— LIABILITY FOR DAMAGES.

No liability attaches to a city or town for damages caused by defects or negligence in or around public school property while said property is used strictly for municipal purposes.

You have requested my opinion on the legality, advisability and value of adding to section 1 of House Bill No. 803 the following clause: "such use shall not be construed to impose any additional liability on the city or town," so that this section would read:—

To the
Committee on
Education.
1914
April 6.

For the purpose of promoting the usefulness of the public school property the school committee of any city or town may conduct such educational and recreation activities in or upon school property under its control, and shall allow the use thereof by individuals and associations, subject to such regulations as the school committee shall establish, for such educational, recreation, social, civic, philanthropic and similar purposes as the committee may deem to be for the interest of the community, provided that such use shall not interfere or be inconsistent with the use of the premises for school purposes. Such use shall not be construed to impose any additional liability on the city or town.

A city or town is not answerable in damages for the acts or neglect of its public officers in the discharge of their official functions, nor for injuries to individuals caused by defects or negligence in or around a schoolhouse or yard, because the maintenance of schools is a public function. 28 Cyc. 1308.

In a case where the plaintiff fell and was seriously injured by reason of an unsafe staircase in a schoolhouse, the defendant was held not liable, for the reason last stated. *Hill v. Boston*, 122 Mass. 344.

Similar decisions are to be found in *Sullivan v. Boston*, 126 Mass. 540, and *Bigelow v. Randolph*, 14 Gray, 541.

But where a city or town lets for hire a building erected for municipal purposes, it is liable for an injury caused by a defect or want of repair in the building, or for the negligence of its agents or servants in the maintenance of the building. 28 Cyc. 1308.

So in the case of *Little v. Holyoke*, 177 Mass. 114, the city was held liable in an action for personal injuries caused by the plaintiff falling down a flight of stairs in a hall of the defendant city. The city occasionally let the hall for public gatherings, and on the evening in question the hall was let for the purposes of an entertainment to be given by the lessee.

Of similar import is the case of *Worden v. New Bedford*, 131 Mass. 23.

The proposed legislation apparently contemplates the letting of public school property for hire, subject to such regulations as the school committee shall establish, for such educational, recreation, social, civic, philanthropic and similar purposes as the committee may deem to be for the interest of the community; and the question arises, can a city or town acting under the provisions of this act be exempted from liability for an injury caused by a defect or want of repair in the building or other property let, or by act or neglect of its servants and agents? To state the question another way, can the Legislature exempt cities and towns from liability for injuries incurred during the use of school buildings for some purposes?

The Constitution of Massachusetts guarantees a certain remedy for all injuries or wrongs. Declaration of Rights, Art. XI. Statutes in conflict with this article necessarily are void. *Hunt v. Lucas*, 99 Mass. 404.

No question of vested rights is involved. We have not here the question as to whether vested rights of action may be interfered with, but rather, whether rights of action may be prevented from accruing. Article XI. of the Constitution, above cited, is merely an assertion of the old common-law rule that for every wrong there must be a remedy. As I have already stated, one of the exceptions to this rule is that a municipality is not liable for injuries caused by a municipal use of municipal property. For the Legislature to exempt municipalities further would be in conflict with Article XI. of the Declaration of Rights. To exempt municipalities and not exempt private concerns doing the same business of renting halls would be an unconstitutional discrimination.

Is the contemplated use strictly a municipal use? If so, exemption from liability by statute is unnecessary. If not a municipal use, exemption is impossible.

It is respectfully suggested that the bill be so phrased as to make it clearly appear that the use of school property permitted by it shall be municipal. The addition of the proposed clause may tend to support this construction.

LABOR — CONSTRUCTION OF PUBLIC WORKS.

Under St. 1909, c. 514, § 21, the phrase "construction of public works" refers to actual building operations and not to the work of preparing material.

You have requested my opinion on the following question: —

To the
Commissioner
of Labor.
1914
April 8.

A general contractor, engaged in the construction of a public building for one of the cities of the Commonwealth, has made a contract for the special preparation of a portion of the material to be used in the construction of the said building with a subcontractor from outside the Commonwealth, who was the lowest bidder. The work on the said material in adapting it for use in the building is being done outside the Commonwealth, and by persons not citizens of Massachusetts. The general contractor knew at the time the contract was made that the work was to be done in this way and by such persons. Moreover, the contract with the subcontractor contains no provision that in the employment of mechanics or laborers preference shall be given to citizens of Massachusetts or citizens of the United States.

Will you kindly advise whether or not in your opinion the above facts constitute a violation of the Acts of 1909, chapter 514, section 21?

Section 21 of chapter 514 of the Acts of 1909 reads as follows: —

In the employment of mechanics and laborers in the construction of public works by the commonwealth, or by a county, city or town, or by persons contracting therewith, preference shall be given to citizens of the commonwealth, and, if they cannot be obtained in sufficient numbers, then to citizens of the United States; and every contract for such works shall contain a provision to this effect. Any contractor who knowingly and wilfully violates the provisions of this section shall be punished by a fine of not more than one hundred dollars for each offence.

The question hinges on the meaning of the words "construction of public works." This phrase was interpreted by Attorney-General Dana Malone, in 1906, to include only the actual building operations. III. Op. Atty.-Gen. 9. The literal meaning of the word "construction" is "putting together."

An early precedent is found in 1 Kings VI., VII., in which it is stated that King Solomon's Temple "was built of stone *made ready* at the quarry; and there was neither hammer nor axe nor any tool of iron heard in the house, *while it was in building.*"

Your very letter of inquiry refers to the contractor as engaged in the construction of the building and to the subcontractor as engaged in the preparation of material to be used in the construction.

I am of opinion that the words "construction of public works" were used by the Legislature with the intention that they be narrowly construed and that the facts as stated in your letter do not constitute a violation of the statute.

COMMISSIONERS ON FISHERIES AND GAME — EXPENSES.

Traveling expenses incurred on strictly official business, but no other expenses, may be allowed the Commissioners on Fisheries and Game.

To the Auditor
of the Commonwealth.
1914
April 9.

In your letter requesting my opinion as to whether certain bills for expenses presented for allowance by members of the Commission on Fisheries and Game should be allowed, you state that "in the case of one of the members making regular trips from his home by way of Highland station to Boston he seeks to charge the State for fares between his home and his Boston office, where he transacts private business, on the days on which he performs any business for the State;" that "another contention of the Commission is that as their duties are not all performed in the office in the State House, they are entitled to traveling expenses from their homes to Boston on days when the State's business requires them to visit any place in Boston outside of the office in the State

House;" and further, that certain members of the Commission on Fisheries and Game "visit the State House almost daily, and contend that should there be business of the commission requiring them to visit any other place in Boston than the office in the State House, they should be allowed expenses for traveling from their homes, and also for their midday meal on those days."

In many instances special provision has been made for the payment of traveling and other expenses necessarily incurred in the service of the Commonwealth. Thus it was provided that each member of the former Board of Cattle Commissioners should receive ". . . his actual travelling expenses which have been necessarily incurred;" that members of the State Board of Charity shall receive ". . . their travelling and other necessary expenses." So, too, that each member of the Civil Service Commission shall be paid ". . . his travelling and other expenses incurred in the performance of his official duties."

The law covering the payment of expenses of members of the Commission on Fisheries and Game is found in section 54 of chapter 6 of the Revised Laws, and the rule governing the payment of such expenses is found in the words, "shall be allowed their actual reasonable expenses incurred in the performance of such duties."

No case under this provision of the statute has arisen for determination by the Supreme Judicial Court of this Commonwealth. The case of *Richardson v. State*, involving a similar question, was decided by the Supreme Court of Ohio in 1902. The purpose of the action was to determine whether money paid to Richardson out of the county treasury as compensation for his services as county commissioner was illegally paid, and if so, to recover judgment therefor. The Ohio statute is as follows:—

Each county commissioner shall be allowed three dollars for each day that he is employed in his official duties, and five cents per mile for his necessary travel, for each regular or called session, not exceeding one session each month, or twelve in any one year, and five cents per mile when traveling within their respective counties on official business, to

be paid out of the county treasury on the warrant of the county auditor; . . . and when necessarily engaged in attending to the business of the county pertaining to his office under the direction of the board, and when necessary to travel on official business out of his county, shall be allowed, etc.

In its decision of the case the court said:—

It must be conceded that the \$3 per day allowed the commissioner is the limit of his compensation for his day's work, in whatever way it may be performed in the discharge of his official duties. He cannot lawfully claim that the county is also bound to pay his board or other personal expenses. And the "mileage" allowed him is intended to compensate him for expenses of his travel on official business. . . . To make such expenses an additional burden on the public funds would require a plain and unequivocal provision of the statute. An intention to do so will not be inferred. . . . The expenses authorized to be paid a commissioner under the provision of the statute in question are, we think, official expenses only, as distinguished from those which pertain to his personal comforts and necessities. . . . The purpose of the provision was to reimburse him when, in the language of the statute, the money had been "actually paid in the discharge of his official duty." . . . It is a fair inference that, if it had been intended to reimburse the commissioner for expenditures of this character, the Legislature would have expressed that intention in plain terms. It is well settled that the compensation of public officers cannot be enlarged, by implication, beyond the terms of the statute.

The last sentence quoted from the opinion of the Ohio court undoubtedly states correctly the rule of law to be applied in cases like those stated in your letter of inquiry. A member of this commission, traveling from his place of residence to his own office or other place where he regularly carries on his own business, and to which he is going for that purpose, cannot be said to be traveling on the business of the Commonwealth so as to enable him to charge traveling or other expenses; and this is so even though he may during the day transact some item of official business at his own place of business. The expense is not incurred in the performance of his official duty; and the same rule of necessity applies to your question in regard to charges made for meals at the place of residence or place of business of members of the commission. Nor, in my opinion,

are members of the commission who receive an annual salary or its equivalent, when on duty in Boston, and who happen in the course of their official duties to have to go to some part of the city other than the office provided by the Commonwealth for their use, entitled by that fact to charge to the Commonwealth the expense of their midday meals. It is to be presumed that they would have the midday meal if they remained in the office provided by the Commonwealth. It is reasonably apparent that the expense of this meal is not increased by reason of the fact that their duties call them outside of the office provided by the Commonwealth. I think, however, they may properly charge as traveling expenses trolley fares paid out by them in going about the city on strictly official business.

It is my opinion that the items specified in your letter of inquiry should not be allowed.

CONSTITUTIONAL LAW — REGULATION OF SALE OF TICKETS TO PLACES OF AMUSEMENT.

It is not within the constitutional power of the Legislature to provide regulations for the sale of tickets to places of amusement.

You have requested my opinion as to whether the substitute suggested by Mr. Caro for House Bill No. 236 relative to the sale of tickets of admission to places of amusement would be constitutional. Mr. Caro's bill reads as follows: —

To the
Committee on
Mercantile
Affairs.
1914
April 10.

It shall be a condition of any license hereafter granted by any city or town, or by any other public authority, for any public entertainment, that tickets of admission to the same shall not be sold to any dealer in such tickets, or to any other person, with the intent or knowledge that such tickets shall be resold to individual purchasers; or with the intent or knowledge that such tickets shall be disposed of in any manner at a price exceeding the price for which they were sold, or exceeding the price advertised for such tickets by the person, firm, or corporation issuing the same. If the said condition is violated by any licensee, the license shall thereupon be revoked by the authority granting the same; and it is hereby made the duty of the licensing authority to see that the said condition is complied with.

It was ruled by my predecessor, Hon. James M. Swift, in an opinion to the House Committee on the Judiciary dated Feb. 15, 1912, that —

The business of conducting a theatre or other place of amusement is a private business, and while such business may be regulated by the Legislature in respect to public morals or safety, under the police power, the right or regulation cannot be extended to the sale of tickets of admission to places of amusement. (III. Op. Atty.-Gen. 491, 492.)

He quotes from the leading case on the subject as follows: —

The sale of a theatre ticket at an advance upon the original purchase price, or the business of reselling such tickets at a profit, is no more immoral, or injurious to public welfare or convenience, than is the sale of an ordinary article of merchandise at a profit. (*Ex parte Quarg*, 149 Cal. 79, 81.)

The Legislature has certain powers of regulation and has not certain other powers of regulation, and the distinction between these two sorts of powers remains the same, regardless of the manner in which the Legislature seeks to enforce them. Direct statutory prohibition or indirect prohibition by means of conditions in licenses is merely a method of enforcement, and does not go to the root of the question of legislative powers.

It is therefore my opinion that the proposed regulation of the sale of tickets to places of amusement is unconstitutional, regardless of the method by which its enforcement is sought.

INSURANCE COMPANY — INVESTMENTS — PECUNIARY INTEREST OF OFFICERS.

A person who has an interest in real estate, but solely as trustee for another, may lawfully serve on the investment committee of an insurance company which places a loan on said real estate.

You request my opinion upon the following question: —

If a person as a trustee holds a parcel of real estate which, with certain other parcels, is exchanged for stock in a corporation which was organized for the purpose of acquiring such land, and the directors of an insurance

company, one member of which is the aforesaid trustee, who is also a member of the insurance company's finance committee, negotiates a mortgage loan with said real estate corporation, can that director and member of the finance committee of the insurance company be held to have acted in violation of the statute (St. 1907, c. 576, § 26, par. 4)?

That paragraph provides that —

All investments and deposits of the funds of the company shall be made in its corporate name, and no director or other officer thereof, and no member of a committee having any authority in the investment or disposition of its funds, shall accept, or be the beneficiary of, either directly or remotely, any fee, brokerage, commission, gift or other consideration for or on account of any loan, deposit, purchase, sale, payment or exchange made by or in behalf of such company, or be pecuniarily interested in any such purchase, sale or loan, either as borrower, principal, co-principal, agent or beneficiary except that, if a policy holder, he shall be entitled to all the benefits accruing under the terms of his contract.

An examination of the law apart from the statute may be in some degree helpful in determining the effect of the statute. It is settled beyond question that the directors of corporations are bound in their official capacity to act in entire good faith. They are to be regarded as trustees for the shareholders and are held to a strict fidelity to their trust. They are bound to exercise their powers for the benefit of the corporation only and cannot deal for themselves and for the corporation in one and the same transaction. A director cannot with propriety vote in the board of directors upon a matter affecting his own private interest any more than a judge can sit in his own case. It has been held by some courts that a director cannot contract with his company and that such contracts are void; and courts that have not gone to this extreme have held that contracts between directors and corporations, though not void, are always to be subjected to the closest scrutiny and are voidable unless made in that entire good faith which the law demands of this species of fiduciary. *Nye v. Storer*, 168 Mass. 53; *Varren v. Para Rubber Shoe Co.*, 166 Mass. 97.

In the case you have stated the director was not a party to the contract and cannot be said to have accepted or to have

been the beneficiary of, either directly or remotely, any fee, brokerage, commission, gift or other consideration for or on account of the loan. It is true that, by reason of his position as a director of the insurance company and as a member of its finance committee, he was a factor in determining whether and the terms upon which this loan should be made, but you state that he held the real estate in question as trustee, and if that is so, in exchanging his real estate for stock in a corporation, he simply changed the form of the trust property. It hardly need be said that a trustee cannot, by a sale or exchange of trust property, acquire property of his own. If he exchanged the real estate which he held in trust for stock in a real estate corporation, the stock which came to his hands in the course of this transaction was impressed with the same trust under which he held the real estate. He was not an officer of the real estate corporation, and any gain or benefit accruing to the stock of that corporation in his hands was not at all to his personal profit or benefit but for the benefit of his *cestui que* trust; so I do not see how it could be held that the trustee was pecuniarily interested in the loan either as borrower, principal, co-principal, agent or beneficiary.

The statute to which you refer is penal and is to be construed strictly, and even though he held the stock in his own right, it is very difficult to see how he could be held liable under this statute.

I am of the opinion that your inquiry must be answered in the negative.

SURETY COMPANIES — BONDS — RENEWALS.

A surety company bond may be renewed and its term extended by a separate instrument properly executed.

You have requested my opinion as to whether or not certificates of renewal furnished and executed by a bonding company that is surety on a bond executed and filed in accordance with the requirements of chapter 656 of the Acts of 1910 are adequate and sufficient to renew a bond.

To the
Treasurer and
Receiver-
General.
1914
April 11.

Chapter 656 of the Acts of 1910 relates to persons, partnerships, associations or corporations engaged in the collection business and conducting a collection agency, bureau or office in this Commonwealth and requires that every such person, partnership, association or corporation shall file a bond with the Treasurer and Receiver-General.

Your query is whether the certificate of renewal is sufficient to renew and keep in force a bond the term of which has expired or is about to expire.

In its popular sense the word "renew" means "to refresh, revive or rehabilitate an expiring or declining subject, but not appropriate to describe the making of a new contract or the creation of a new existence; to re-establish a particular contract or another period of time; to restore to its former conditions; to make again; to make over, to re-establish; or to rebuild." 34 Cyc. 1331. The word "renewal" in its broadest sense means "that which is made anew or re-established; a change of something old for something new; the establishment of the particular contract for another period of time; imparting continued or new force and effect; the substitution of a new right or obligation for another of the same nature."

In the case of *Strouse v. American Credit Indemnity Co.*, 91 Md. 244, 257, the court in deciding a question involving this point used this language: —

A renewal of the certificate of the United States Credit System Company means the same certificate with all the stipulations contained for another year, or another certificate to cover another year identical in every word and figure with the certificate it succeeded.

I would suggest that in the use of a certificate of renewal the principal as well as the surety on the bond be made a party. The form of the certificate of renewal in question did not accompany your inquiry, and I am therefore unable to pass upon its sufficiency, but I have no doubt that a bond may be renewed and its term extended to cover such period of time as may be agreed upon by a separate instrument properly executed.

CITIES AND TOWNS — PUBLIC DOCUMENTS.

Cities and towns have no authority to dispose of such books, reports and laws as have been received from the Commonwealth under St. 1908, c. 142, §§ 1 and 2.

To the Com-
missioner of
Public Records.
1914
April 13.

You ask my opinion upon the following question: Have cities or towns authority to dispose of the copies of the series of public documents which they do not care to retain?

Sections 1 and 2 of chapter 142 of the Acts of 1908 are as follows: —

SECTION 1. Each city and town shall provide a suitable place, or places, to be approved by the commissioner of public records, for the preservation and convenient use of all books, reports and laws received from the commonwealth; and for every month's neglect so to do shall forfeit ten dollars.

SECTION 2. Said books, reports and laws shall be in the custody or control of the city or town clerk, unless the city council or selectmen shall, by vote, designate some other officer, the town counsel or other person to have said custody or control of either all or part of the same.

This chapter makes it the duty of our cities and towns to take care of all the books, reports and laws that may be bestowed upon them by the Commonwealth, and requires of them the task of providing a suitable place for the preservation and convenient use of all such books, reports and laws. The authority conferred and the duty created by this statute are to preserve and keep. The only relief against this burdensome situation that I have been able to find is contained in chapter 422 of the Acts of 1908, wherein it is enacted that —

In case a city or town at any annual city or town election shall vote not to receive the series of public documents, and the commissioner of public records shall report to the secretary of the commonwealth that in his opinion such city or town is unable to make suitable provision for the care and use of such documents, he may discontinue sending such documents to such city or town.

I regret to say that I am forced to the opinion that cities and towns have no authority to dispose of the books, reports and

laws specified in chapter 142 of the Acts of 1908, above quoted, in any other way than to provide a suitable place for their preservation and convenient use, except as provided by chapter 422 of the Acts of 1908.

CIVIL SERVICE — SEALER OF WEIGHTS AND MEASURES IN
LOWELL.

The sealer of weights and measures in Lowell is not subject to civil service rules.

You have requested my opinion upon the following questions: —

To the Civil
Service Com-
mission.
1914
April 13.

First. — Was the enactment of chapter 645 of the Acts of 1911 in effect a repeal of the provisions of chapter 382 of the Acts of 1909, and, therefore, does it exempt this position in the city of Lowell from the operation of the civil service law and rules?

Second. — Does the fact that by said section 39 of chapter 645 of the Acts of 1911 providing for the election by the municipal council of a sealer of weights and measures exempt the office from civil service classification in view of the provisions of section 9 of chapter 19 of the Revised Laws above referred to?

Section 9 of chapter 19 of the Revised Laws exempts from civil service classification judicial officers and all officers elected by the people or whose appointment is subject to confirmation by a city council.

Under the authority conferred by chapter 382 of the Acts of 1909 the Civil Service Commission prepared and promulgated a rule of classification which became effective Sept. 1, 1909, and reads as follows: —

RULE 7.

Class 6. — All principal or assistant sealers of weights and measures holding office by appointment under any city, or any town of over ten thousand inhabitants, whether such officers are heads of principal departments or not, and also the inspectors of weights and measures of the Commonwealth.

By section 37 of chapter 645 of the Acts of 1911, which is an act to amend the charter of the city of Lowell, it is provided:—

There shall be the following administrative officers, who shall perform the duties prescribed by law for them, respectively, . . . as the municipal council may prescribe, . . . a sealer of weights and measures.

Section 39 of the last-mentioned chapter provides that—

The municipal council shall have the power to elect the administrative officers named in section thirty-seven. . . .

Section 66 of said chapter provides:—

All special acts and parts of special acts inconsistent herewith are hereby repealed, and no general act or part of a general act inconsistent herewith shall hereafter apply to the city of Lowell. . . .

The provisions of Rule 7, above quoted, relate to sealers of weights and measures holding office by appointment, while the charter of the city of Lowell makes the office of sealer of weights and measures in that city elective. If we give to the rule made by the Civil Service Commission the force and effect of law, the provision of the charter is a later enactment, making a special and exceptional provision in regard to the office of sealer of weights and measures in the city of Lowell, and apparently is intended to deal with the whole subject of election to the office of sealer of weights and measures in that city. The provisions of the chapter are also entirely inconsistent with the civil service rule. It is my opinion, therefore, that the charter of the city of Lowell, by reason of its special provisions, exempts the position of sealer of weights and measures in that city from civil service classification.

CONSTITUTIONAL LAW — TRADING STAMPS — EXCISE TAX — LICENSE FEES.

A law requiring the payment of a license fee of \$6,000 per annum by any firm furnishing trading stamps with any sale of goods would be unconstitutional.

You have requested my opinion as to the constitutionality of House Bill No. 1643, entitled "An Act relative to the use of stamps, coupons and similar devices for or with the sale of goods, wares and merchandise."

To the
 Committee on
 Mercantile
 Affairs.
 1914.
 April 17.

This bill provides that every person, firm or corporation furnishing stamps, coupons, tickets, certificates, cards or other similar devices to any other person, firm or corporation to use in, with or for the sale of any goods, wares or merchandise shall be required to obtain annually "a separate license from the auditor of each county wherein such furnishing or selling or using shall take place, for each and every store or place of business in that county owned or conducted by such person, firm or corporation, from which such furnishing or selling or in which such using shall take place." By section 2 it is provided that the sum of \$6,000 per license shall be paid, and, in addition to this, that every person, firm or corporation who shall use any stamps, coupons, tickets, certificates, cards or other similar devices in, with or for the sale of any goods, wares or merchandise, entitling the purchaser receiving the same to procure from any person, firm or corporation any goods, wares or merchandise free of charge or for less than the retail market price thereof, must also obtain a like license and pay a license fee of \$6,000 a year.

It would appear that the provisions of this bill are so broad that a person who receives any stamps, coupons, tickets or other similar devices and uses them for the purpose of procuring any goods, wares or merchandise is also required to procure a similar license from the county auditor and to pay the license fee of \$6,000.

The taxing power vested in the Legislature by the Constitution is contained in section IV. of article I. of chapter I. and is expressed in the following language:—

Full power and authority are hereby given and granted to the said general court . . . to impose and levy proportional and reasonable assessments, rates, and taxes, upon all the inhabitants of, and persons resident, and estates lying, within the said commonwealth; and also to impose and levy reasonable duties and excises upon any produce, goods, wares, merchandise, and commodities, whatsoever, brought into, produced, manufactured, or being within the same.

It is apparent that the methods of taxation provided by the Constitution are, first, by proportional and reasonable assessments, rates and taxes upon the inhabitants of and persons resident and estates lying within the Commonwealth; and second, as the State may not since the adoption of the Federal Constitution levy duties on imports, by reasonable excises upon any produce, goods, wares, merchandise and commodities.

That the constitutionality of the proposed measure cannot be sustained under the constitutional provision in regard to the levy of proportional rates and taxes upon the inhabitants and persons resident and estates lying within the Commonwealth is so evident as to render comment or discussion unnecessary.

The question then arises, Can this proposed bill be sustained as an exercise of the power to levy reasonable excises?

The Constitution places two limitations upon the authority of the Legislature to levy excise taxes: (1) that they must be reasonable, and (2) that they may be levied only upon produce, goods, wares, merchandise and commodities. *Portland Bank v. Apthorp*, 12 Mass. 252.

Clearly, the use of stamps, coupons or certificates referred to in the bill before me, if subject to an excise tax under the provision of the Constitution last above quoted, is so subject because it falls under the head of "commodities," and the question to be determined is whether the method of transacting business with or by the use of stamps, coupons, certificates or other similar devices is a commodity.

The Legislature of 1904 passed an act imposing an excise tax on the business of selling, giving or delivering trading stamps, checks, coupons or other similar devices, and the case of *O'Keeffe v. Somerville*, 190 Mass. 110, was an action brought to test the validity of that statute. The plaintiff in that case used trading

stamps in his business and paid under protest to the city of Somerville the excise tax provided by the statute, and then brought suit to recover the amount so paid. The Supreme Judicial Court in its decision in that case said:—

The first and principal question before us is whether the right to conduct the business, in the manner described in the first section (of that statute) is a commodity within the meaning of the constitution.

And said further:—

It is not necessary in the present case to determine the meaning of the word “commodities,” in reference to every possible application of it, but we are of opinion that it is not broad enough to include every occupation which one may follow, in the exercise of a natural right, without aid from the government, and without affecting the rights or interests of others in such a way as properly to call for governmental regulation. Whatever may be done by the Congress of the United States under its general power to levy excise taxes (see *Thomas v. United States*, 192 U. S. 363) we are of opinion that, under the limitation to commodities, the General Court of Massachusetts cannot levy an excise tax upon the business of a husbandman or an ordinary mechanic. If this is not the necessary effect of the decision in *Gleason v. McKay*, *ubi supra*, it certainly is intimated by the language of the court in the opinion.

In the statute before us the selling or giving of trading stamps, in connection with the sale of articles, can hardly be considered a business in itself; but the business which the statute seeks to reach is the selling of articles under an arrangement to deliver stamps as a part of the sale, or as an accompaniment of it. The statute includes sales of articles of every kind, and it describes the delivery of stamps in terms that include deliveries which, under the decisions of this court, are entirely unobjectionable in law. *Commonwealth v. Sisson*, 178 Mass. 578. *Commonwealth v. Emerson*, 165 Mass. 146. Such deliveries have generally been considered permissible in connection with the sale of articles, in the exercise of a common right, and many cases have been decided which invalidate statutes or ordinances intended to prevent such deliveries. *People v. Gillson*, 109 N. Y. 389. *People v. Zimmerman*, 102 App. Div. (N. Y.) 103. *Ex parte McKenna*, 126 Cal. 429. *State v. Dalton*, 22 R. I. 77. *Long v. State*, 74 Md. 565. *Young v. Commonwealth*, 101 Va. 853.

And further:—

One of the reasons why these methods are allowable is found in the familiar principle that constitutional liberty means “the right of one to

use his faculties in all lawful ways, to live and work where he will, to earn his livelihood in any lawful calling, and to pursue any lawful trade or avocation." The restrictions upon conduct which may be imposed in the exercise of the police power include everything that may be necessary in the interest of the public health, the public safety or the public morals, and they include nothing more. These doctrines have often been discussed and elaborated, and it is unnecessary to consider them at length in this case. In applying them to the business mentioned in this statute, no reason appears for the imposition of an excise tax upon the business of selling articles with an accompaniment of stamps which entitle the vendee to other property.

It has been further said by our Supreme Judicial Court that the mere exercise of a natural right in the performance of labor of the simplest kind, or in making an ordinary simple contract, is not a commodity within the meaning of the Constitution. *Opinion of the Justices*, 196 Mass. 625, 629.

The business or the method of doing business at which this bill is aimed is not, then, according to the decisions of the Supreme Judicial Court, a commodity, and therefore is not and cannot be subject to an excise tax.

It may be urged, however, that the purpose of this bill is not to levy an excise tax but to regulate by means of a license the management and conduct of the method of transacting business by or with the use of trading stamps or other similar devices. It is to be borne in mind that this method of doing business has been repeatedly held by our Supreme Judicial Court to be lawful. *Commonwealth v. Emerson*, 165 Mass. 146; *Commonwealth v. Sisson*, 178 Mass. 578. And that if the stamps, coupons or other similar devices mentioned in this bill are used in such a way as to constitute a lottery or game of chance, such use may be punished under criminal statutes already in existence. And it should be further borne in mind that it is the constitutional right of persons in this Commonwealth to acquire and possess property and to transact legitimate business. Declaration of Rights, Art. I.

Coming to the consideration of the question of the authority of the Legislature to impose license fees, the rule is that —

If the Legislature has power to prohibit a certain act altogether [as, for instance, the sale of intoxicating liquor] it may establish a pecuniary imposition upon its performance intended as a substantial prohibition or as a drastic limitation of the number of persons who will perform the act; if, however, the Legislature has no power to prohibit the act it cannot establish a pecuniary imposition really intended as a prohibition. . . .

When the Legislature has neither the power to prohibit nor to tax a certain act, but the act is of such a nature that a reasonable inspection is necessary for the public welfare, the Legislature may impose a license fee and prohibit the performance of the act until the fee is paid, but in such a case the fee may cover only the cost of inspection. (Nichols on Taxation in Massachusetts, pp. 4 and 5; 38 Cyc. 927.)

The method of doing business by or with the use of stamps, coupons or other similar devices is one which the Legislature has no authority to prohibit under the Constitution, and since it is not a commodity no excise tax can be levied upon it. The license fee fixed in the proposed bill is greatly in excess of any probable cost of inspection of the business and is evidently intended to prohibit the transaction of a business that the Supreme Judicial Court has held to be lawful.

My conclusion is that the proposed bill, if enacted, will be unconstitutional.

WRENTHAM STATE SCHOOL — RIGHTS OF TRUSTEES IN MAIL ADDRESSED TO INMATES.

Trustees of the Wrentham State School may exercise discretion in preventing delivery of objectionable mail to inmates.

Valuable enclosures in mail addressed to inmates of the Wrentham State School must be delivered or returned.

You ask my opinion upon the following questions: —

What are the rights of the trustees to open mail addressed to inmates of the Wrentham State School? If the contents of letters addressed to the inmates of the Wrentham State School are, in the opinion of the superintendent, objectionable, what are the powers of the school in the matter? May the letter be destroyed or must it be returned to the sender, or must it be delivered? What are the rights of the trustees as to letters sent out by the inmates of the institution? Have they the right to open such letters, and if the contents are objectionable destroy them?

To the
Trustees of the
Wrentham
State School.
1914
April 18.

Section 7 of chapter 504 of the Acts of 1909 provides that —

The board shall have general supervision of all public and private institutions and receptacles for insane, feeble-minded or epileptic persons or for persons addicted to the intemperate use of narcotics or stimulants, and the Hospital Cottages for Children, and when so directed by the governor may assume and exercise the powers of the board of trustees of said state institutions in any matter relative to the management thereof. The board shall have the same powers relative to state charges in institutions or other places under its supervision and to their property as are vested in towns and overseers of the poor relative to paupers supported or relieved by towns.

By section 85 of this chapter it is further provided: —

All patients in any institution under the supervision of the state board of insanity shall be allowed, subject to the regulations of the board, to write freely to the board, and letters so written shall be forwarded, unopened, by the superintendent or person in charge of the institution to said board for such disposition as it shall consider right; and the board may send any letters or other communications to any patients in any of said institutions whenever it may consider it proper so to do. All other letters to or from the patient may be sent as addressed or to his legal or natural guardian or most interested friend.

Your inquiry raises a question under the Federal postal laws. The assistant attorney-general for the Post-office Department, in an opinion rendered under date of Feb. 6, 1894, ruled that the authorities of an insane asylum are required to exert a proper discretion in the matter of delivering mail to the inmates and in preventing the transmission of letters intended by such inmates for delivery to other persons, especially when the interests or the recovery of patients might be injured or the safe administration of the affairs of the institution interfered with.

Section 85 of the statute above quoted confers authority upon the State Board of Insanity to supervise the correspondence of all patients in institutions over which they exercise control, of which your institution is one. The language of this section is so clear as to make explanation or comment unnecessary.

Referring to your question as to postage and money enclosed

in letters to patients, it is my opinion that in any case where it is inadvisable to deliver the money or stamps or other valuable enclosure found in a letter to the person addressed, it should be returned to the sender.

COMMISSIONER OF CORPORATIONS — INSPECTION OF TAX
RETURNS.

Only such persons as may have occasion to inspect tax returns for the purpose of assessing or collecting taxes have a right to inspect tax returns of Massachusetts corporations.

Under date of April 17 you state that the Board of Registration in Pharmacy respectfully requests an order from this department to the Commissioner of Corporations to permit a representative of your Board to inspect the franchise tax return of the Jaynes Drug Company, to enable you to act intelligently upon the applications of the Jaynes Drug Company for permits to operate drug stores and for certificates for sixth-class liquor licenses.

To the
Board of
Registration
in Pharmacy.
1914
April 22.

The statute, St. 1909, c. 490, pt. III., § 40, as amended, provides as follows with reference to the annual return to be filed by domestic corporations: —

Such return shall be filed with the tax commissioner. In the case of domestic business corporations the whole of said return, and in the case of other corporations so much of said return as relates to the profit or loss which has resulted from the business of the corporation shall be open only to the inspection of the tax commissioner, his deputy, clerks and assistants, and such other officers of the commonwealth as may have occasion to inspect it for the purpose of assessing or collecting taxes.

It occurs to me that in making this request your Board may have thought that the Jaynes Drug Company is a foreign corporation. It is in fact a Massachusetts corporation, and its return to the Tax Commissioner is subject to the provisions of the statute above quoted. Under this statute the only persons authorized to examine the return are the Tax Commissioner and his clerks and assistants and such other officers of the

Commonwealth as may have occasion to inspect it for the purpose of assessing or collecting taxes.

In my opinion it is not within the jurisdiction or authority of the Attorney-General to make such an order as your Board has requested.

BOARD OF AGRICULTURE — POULTRY PREMIUM BOUNTY.

An incorporated poultry association is entitled, under St. 1909, c. 428, to receive aid from the Poultry Premium Bounty Fund for one annual exhibition only.

Unincorporated associations are not entitled to receive aid from the Poultry Premium Bounty Fund.

To the
Massachusetts
Agricultural
College.
1914
April 22.

You ask my opinion upon the following questions: —

First, under the provisions of the statute can a State poultry association, incorporated, hold more than one exhibition of poultry during a year and receive a part of the poultry premium bounty based on the total number of entry fees received by the association in competition with the local incorporated associations; and second, would a local unincorporated branch of a State association be entitled to draw upon the Poultry Premium Bounty Fund if such local branch held a poultry show or exhibit annually during the months of November, December or January?

The statute governing this matter is chapter 428 of the Acts of 1909, which is as follows: —

SECTION 1. The sum of one thousand dollars shall be paid annually in the month of August from the treasury of the commonwealth to the board of agriculture, which shall be known as a Poultry Premium Bounty, and shall be used by said board to encourage and improve the breeding of poultry. Said bounty shall be distributed by said board among the poultry associations hereinafter designated, during the month of September of each year, on the basis of the total entry fees received by such associations, respectively, during the year preceding that time, as hereinafter provided, and the sum so distributed shall be used by such associations for the purpose of enabling them to hold annual exhibitions of poultry and for the payment of premiums only. The board may make such rules as it may deem suitable for carrying out the provisions of this act; and any part of said bounty not distributed by the board in any year shall be repaid by it to the treasurer and receiver general.

SECTION 2. No association shall be entitled to any part of said bounty

unless it shall have been incorporated under the laws of the commonwealth for the purposes, principally, of holding exhibitions of poultry within the commonwealth.

SECTION 3. No association shall be entitled to any part of said bounty unless it shall certify to the board of agriculture, not later than the first day of July, under the oath of the president and secretary of such association, that it has held an exhibition of poultry during the months of November, December or January preceding said certificate, the amount of the entry fees paid to the association for such exhibition, and that the association is in need of aid to enable it to continue its exhibitions of poultry, together with such other facts as the board may request.

It is my opinion that an incorporated poultry association is entitled to receive aid from the Poultry Premium Bounty Fund for one show or exhibit annually, and that if a greater number of shows are given by an incorporated association no claim can be sustained for a payment from the premium fund for the additional exhibitions; and this would apply to your proposed corporation as well as to any other.

Second, it is my opinion that under this statute an unincorporated association is not entitled to receive aid from the Poultry Premium Bounty Fund.

DIVORCE CERTIFICATE — MARRIAGE LICENSE.

The certificate of divorce or copy of such record required to be filed with town or city clerks, under St. 1912, c. 535, need not be in the English language.

You ask if it is necessary that the divorce certificate or certified copy of record presented to a town or city clerk by a divorced person seeking a marriage license under the provisions of chapter 535 of the Acts of 1912 be in the English language.

I am of the opinion that it is the law that such certificate or copy of record need not be in English but must necessarily be in the language of the court issuing the decree. The town or city clerk must be convinced, by a translation or otherwise, that the certificate or copy of record shows that a divorce has been granted in accordance with the statement of the person

To the
Secretary of
the Common-
wealth.
1914
April 22.

applying for the marriage license. The certificate or copy of record must also be attached to the marriage license if one is issued and becomes a part thereof, and with this the requirements of the statute are satisfied.

PARDONS — EXPIRATION OF PRISON TERM.

Where the term of a prisoner expires on Sunday by reason of a pardon issued by the Governor and Council, the prisoner should be discharged on the preceding Saturday.

To the Massa-
chusetts State
Prison.
1914.
April 24.

I am in receipt of the following request for an opinion: —

Section 130, chapter 225 of the Revised Laws reads as follows: "A prisoner whose term expires on Sunday shall be discharged on the preceding Saturday." I have received a pardon issued by the Governor and Council on April 8, a part of which reads as follows: "Now Know Ye, That, upon full consideration of the premises, We do hereby pardon the said offence and release him, the said . . . on April 26, 1914, from any further imprisonment under the sentence aforesaid, and do order that he be discharged accordingly." I am somewhat in doubt just when to release him, — whether the section 130 above quoted applies to the pardon or not, and I respectfully ask your opinion in the matter.

The question involved is whether the date set in the pardon is strictly and technically the expiration of the prisoner's "term." Section 132 of the chapter referred to in your letter relates to pardons and states of the Governor's pardon warrant, "Such warrant shall be obeyed and executed, instead of the sentence originally awarded."

In my opinion the effect of such warrant is to substitute a new and shorter term for the original term of imprisonment. The term of the prisoner in question, as shortened by the warrant recited in your letter, expires on Sunday, April 26, 1914. The prisoner should therefore be discharged on the preceding Saturday.

SAVINGS BANKS — INVESTMENTS — MUNICIPAL BONDS.

Savings banks may invest in city bonds in certain States where "money and credits" of said city, added to the last assessed valuation, bring the valuation of the taxable property therein within the provisions of St. 1912, c. 580, § 1, *f*.

You have asked my opinion on the following subject:—

In the official debt statement of the city of Minneapolis, Minn., the city comptroller has not included in the amount of the last valuation of property for assessment of taxes the amount of "money and credits" that are assessed under chapter 285, Laws of Minnesota, 1911. This amounts to more than \$41,000,000. The city of Minneapolis has issued additional bonds which throws the net indebtedness more than 7 per cent. of the assessed valuation, if the amount of "money and credits" is not included in the total valuation. This department requests that you give it your opinion if the city of Minneapolis could include in its total valuation the amount of the assessed value of "money and credits," and by so doing would it comply with subdivision *e* of clause second, section 68, chapter 590, Acts of 1908?

To the Bank
Commissioner.
1914
April 28.

I assume, both from your mention of "7 per cent." and from the fact that Minneapolis has more than 100,000 population, that you are inquiring about *f* rather than about *e*, as stated in your letter.

Subdivisions *e*, *f* and *g*, as amended by section 1 of chapter 580 of the Acts of 1912, read as follows:—

e. In the legally authorized bonds of the states of New York, Pennsylvania, Ohio, Indiana, Illinois, Michigan, Wisconsin, Minnesota, Missouri and Iowa, and of the District of Columbia, and in the legally authorized bonds for municipal purposes, and in the refunding bonds issued to take up at maturity bonds which have been issued for other than municipal purposes, but on which the interest has been fully paid, of any city of the aforesaid states which has at the date of such investment more than thirty thousand inhabitants, as established by the last national or state census, or city census certified to by the city clerk or treasurer of said city and taken in the same manner as a national or state census, preceding such investment, and whose net indebtedness does not exceed five per cent of the valuation of the taxable property therein, to be ascertained by the last preceding valuation of property therein for the assessment of taxes.

f. In the legally authorized bonds of the states of California, Delaware,

Nebraska, New Jersey, Oregon and Washington, and in the legally authorized bonds for municipal purposes or in refunding bonds which have been issued for other than municipal purposes, but on which the interest has been fully paid, of any city of the states of California, Connecticut, Delaware, Illinois, Indiana, Iowa, Kentucky, Massachusetts, Maine, Maryland, Michigan, Minnesota, Missouri, Nebraska, New Hampshire, New Jersey, New York, Ohio, Oregon, Pennsylvania, Rhode Island, Vermont, Washington and Wisconsin, which has at the date of such investment more than one hundred thousand inhabitants, established in the same manner as is provided in subdivision *e* of this clause, and whose net indebtedness does not exceed seven per cent. of the valuation of the taxable property therein, established and ascertained as provided in subdivision *e* of this clause.

g. In the subdivisions *d*, *e* and *f* of this clause the words "net indebtedness" mean the indebtedness of a county, city, town or district, omitting debts created for supplying the inhabitants with water and debts created in anticipation of taxes to be paid within one year, and deducting the amount of sinking funds available for the payment of the indebtedness included.

Section 1 of the Minnesota statute cited by you contains the meat of the whole statute, and reads as follows: —

"Money" and "credits," as the same are defined in section 798, Revised Laws of 1905, are hereby exempted from taxation other than that imposed by this act, and shall hereafter be subject to an annual tax of three mills on each dollar of the fair cash value thereof.

I learn from other sources than your letter of inquiry that the bonded indebtedness of Minneapolis, including the issue in question and excluding the water debt and sinking funds, is \$15,933,250.82; that the valuation of taxable property, exclusive of money and credits, is \$219,609,553, and that \$41,072,125 of money and credits is taxable under the provisions of the act cited by you.

The question before me is whether the fact that the tax laid on money and credits is limited by law to \$3 a thousand precludes the inclusion of money and credits in determining the valuation of the taxable property of the city. This limit is practically the only distinction between this class of property and the other property, classed as realty and personalty. Money and credits are listed for taxation just as other per-

sonalty is listed. The lists are required to be verified and are tested as to completeness and accuracy in the usual way. The assessment is reviewed and equalized the same as others.

Were it not for the tax limit there would be nothing to differentiate this class of property from other personalty. Does the limit make any real difference with respect to the Massachusetts law relative to legal investments for savings banks?

The determination of the question requires an inquiry into the object of the establishment by the Legislature of the maximum ratio between city indebtedness and valuation. If this ratio was intended as an accurate test of the degree of solvency of the city, then, obviously, property which is only available to a limited extent to satisfy the city's obligations should not be given as much weight as property which is taxable, and therefore available, up to its entire value.

But it is my opinion that the purpose of the ratio is rather to establish a mere arbitrary measure. In this opinion I am fortified by the fact that the measure of size is just such a measure. The bonds of a Minnesota city of 29,999 inhabitants are not legal investment, no matter how solvent it is. The bonds of a Minnesota city having one more inhabitant are. If a Minnesota city has 99,999 inhabitants, and its tax exceeds, by a single mill, 5 per cent. of its valuation, its bonds are not legal investment. Add a single inhabitant, and its bonds thereby become legal investment, and thousands of dollars more in bonds may be issued, for the allowable ratio has thereby jumped to 7 per cent. All this points to the ratio being a mere arbitrary measure. Therefore the words "taxable property" should be construed broadly. If the Legislature wished to restrict the meaning to "taxable property unlimitedly available for payment of the same," or some similar phrase, the Legislature should have done so expressly.

Broadly speaking, money and credits are taxable property. That point has been determined by the Attorney-General of Minnesota. In certain counties of that State the county auditors are paid as salaries sums "regulated by the assessed valuation of real and personal property for purposes of taxation in their

respective counties." In answer to an inquiry from the State public examiner as to whether money and credits should be included in estimating the assessed valuation for the purpose of determining salaries, the State law department said: —

Your inquiry is answered in the affirmative. Moneys and credits are given an assessed valuation, and although the local tax rate is not applied to such valuation, they are nevertheless personal property having an assessed value, and for the above specified purpose must be included in personal property valuations. (Minnesota Attorney-General's Report, 1910-12, p. 256.)

It is therefore my opinion that the city of Minneapolis may include in its total valuation the amount of the assessed value of money and credits, within the meaning of subdivision *f* of clause second of section 68 of chapter 590 of the Acts of 1908, and amendments thereto.

PRISONS — VIOLATION OF PAROLE — DETERMINATION OF DURATION OF SENTENCE.

Although a prisoner released on parole has been returned for breach of same, if his conduct while in prison has been perfect he is entitled to the usual deduction of six days for every month of imprisonment.

You have requested my opinion upon the following statement and inquiry: —

A prisoner was committed to the State Prison Feb. 27, 1893, having been sentenced thereto for a term of twenty-five years for being an habitual criminal. Dec. 20, 1900, he was released upon parole, and returned to the prison Oct. 10, 1901, for having violated the conditions of the same. He was again released upon parole April 9, 1909, and again returned Sept. 22, 1909, for another violation of parole.

During the entire time that he has served in the prison his conduct there has been perfect, he never having been punished for violation of prison rules.

Will you kindly favor the commissioners with your opinion as to when this man's sentence expires, less the time off due him for good conduct in the prison?

The statutes governing this case are sections 2 and 3 of chapter 435 of the Acts of 1887 and sections 20 and 22 of chapter 222 of the Public Statutes, which appear without substantial change in sections 113, 116 and 129 of chapter 225 of the Revised Laws, section 129 having been amended in 1903.

The first question to be determined is whether the violation by the prisoner of the conditions of his permit is to be regarded as the breaking or violation of a rule of the prison. If it is so to be regarded, then the question of how much shall be taken off the deductions from his term of imprisonment for good behavior rests entirely with your Board. But I am of the opinion that it is not so to be regarded. The permit is granted by the Governor and Council upon such terms and conditions as they prescribe, and it does not appear to have been a condition of the permit that the prisoner while at liberty must observe the rules of the prison, nor does it appear that the terms and conditions upon which the permit was granted were intended to have the force of prison rules or to stand in their place. The prisoner, so far as I am informed, had no notice that a violation of the conditions of his permit would be taken as the violation of a rule of the prison. The language of the statute, "they may issue to him a permit to be at liberty," is inconsistent with the idea that he is to be subject to penalties for a breach of the conditions of his permit as for a breach of the rules of the prison; besides, the statute fixes the penalty for a violation of the terms of his permit, namely, that the permit itself is forfeited and that for such violation he shall be returned to the prison, and that the time he has been at liberty shall not be taken into consideration in computing the term of his imprisonment.

Leaving out of account the fact that this prisoner has twice violated the terms and conditions of his permit to be at liberty as not constituting a violation of any prison rule, we come to the question of deductions to be made from the term of his imprisonment for good conduct in prison. The question may arise as to whether such deductions can be claimed by the prisoner as a matter of legal right or whether it rests in the

discretion of your Board. The question was before the Supreme Judicial Court in the case of *Murphy v. Commonwealth*, 172 Mass. 264, and, in rendering its decision, the court said:—

It seems to us that . . . the convict was and is entitled to deductions for good conduct, and to a permit to be at liberty for the time thus deducted, as a matter of right rather than of favor. The object was to furnish an incentive to good conduct while the convict was in confinement, by offering him a reward therefor.

You state that the conduct of this prisoner during his entire term in prison has been perfect. It is my opinion that it is his legal right to have deducted from his term of imprisonment six days for every month thereof, and that your Board should grant the prisoner, upon such terms as you may deem proper, a permit to be at liberty during the time so deducted from his sentence.

CORPORATIONS — INCREASE OF CAPITAL STOCK — FILING FEES.

Corporations must pay a filing fee of one-twentieth of one per cent. on all increases of capital stock, and every increase and decrease must be separately considered.

To the
Secretary of
the Common-
wealth.
1914
April 29.

A business corporation organized under the provisions of chapter 437 of the Acts of 1903, with an authorized capital stock of \$17,000,000, consisting of \$7,000,000 of common stock and the balance in preferred stock, having paid the fees as required by law, by a proper vote reduced its common stock to \$700,000, and immediately authorized an increase of its common stock by the amount of \$4,300,000. You request my opinion as to whether a tax of one-twentieth of one per cent. on the \$4,300,000 increase should be levied as a filing fee under the provisions of section 89 of said chapter.

Sections 42 and 43 of chapter 437 of the Acts of 1903 relate, respectively, to the increase or reduction of the capital stock of corporations, and provide as follows:—

SECTION 42. If an increase in the total amount of the capital stock of any corporation shall have been authorized by vote of its stockholders

in accordance with the provisions of section forty, the articles of amendment shall also set forth: (a) the total amount of capital stock already authorized; (b) the amount of stock already issued for cash payable by instalments and the amount paid thereon; and the amount of full paid stock already issued for cash, property, services or expenses; (c) the amount of additional stock authorized; (d) the amount of such stock to be issued for cash, property, services or expenses, respectively; (e) a description of said property and a statement of the nature of said services or expenses, in the manner required by the provisions of section eleven.

SECTION 43. If a reduction of the capital stock of any corporation shall have been authorized by its stockholders in accordance with the provisions of section forty, the articles of amendment shall also set forth (a) the total amount of capital stock already authorized and issued; (b) the amount of the reduction and the manner in which it shall be effected; (c) a copy of the vote authorizing the reduction. No reduction of capital stock shall be lawful which renders the corporation bankrupt or insolvent, but the capital stock may be reduced by the surrender by every stockholder of his shares and the issue to him in lieu thereof of a proportional decreased number of shares, if the assets of such corporation are not reduced thereby, without creating any liability of the stockholders of such corporation in case of the subsequent bankruptcy of such corporation.

The fees for filing and recording the certificate required by law for an increase of capital stock are fixed by section 89 of said chapter, as amended by section 2 of chapter 396 of the Acts of 1907, which reads as follows:—

The fee for filing and recording the certificate required by section forty-two providing for an increase of capital stock shall be one twentieth of one per cent. of the amount by which the capital is increased.

Section 90 of said chapter 437 provides as follows:—

The fees for filing all other certificates, statements or reports required by law shall be five dollars for each certificate, statement or report, but no fee shall be paid for filing the annual tax return required by section forty-eight.

The reduction and the increase of the capital stock of this corporation, though made by votes as nearly simultaneous in point of time as it was possible to make them, still constitute two separate and distinct transactions. No question appears

to have been raised as to the payment of the filing fee for the certificate showing a reduction of the capital stock, but this was no more a distinct transaction than the act of increasing the stock.

It has been the unvarying practice since the enactment of the present law to charge the statutory fee in every instance of an increase in capital stock, and the statute makes no provision for exemptions or exceptions under any circumstances.

It has been suggested that \$4,000,000 of the \$4,300,000 increase is to be exchanged for a like amount of second preferred stock, and that therefore the filing fees should be computed only on the \$300,000. It is not apparent how the disposition to be made by the corporation of the capital stock acquired by this increase can affect the statutory requirement in regard to the payment of the fee for filing and recording the certificate of increase.

It is my opinion that in this case a filing fee of one-twentieth of one per cent. of \$4,300,000 must be paid by the corporation.

DAMAGES — LIABILITY OF COMMONWEALTH TO RIPARIAN PROPRIETORS.

A riparian proprietor who is damaged by the construction of a bridge which cuts off his access to the sea has no right of action against the Commonwealth.

To the
Committee on
Metropolitan
Affairs.
1914
April 29.

Upon the petition and statement of facts of John Stuart of Quincy, transmitted to me with House Bill No. 1172, you have requested my opinion in regard to the following questions:—

1. Has the petitioner suffered any damage for which the Commonwealth is liable?
2. If the Commonwealth is liable, for what should the petitioner be compensated?

The claim of the petitioner against the Commonwealth is well set forth in his petition, which is as follows:—

The undersigned, citizen of Quincy, respectfully represents that he maintains a boat-building plant, with facilities as well for storing boats, located on Sachem Brook, so called, in said Quincy, which is crossed by

a drawless bridge constructed by the Metropolitan Park Commission, in accordance with chapter 124 of the Acts of 1904, to connect the Quincy Shore Drive; that for many years prior to the construction of said bridge your petitioner had the unobstructed use of the channel of said Sachem Brook, in connection with his business as aforesaid; that he objected to the construction of said bridge, believing that it would result in an injury to his said business and property; and that he was given assurance that said bridge would be so constructed as not to interfere with the free passage of boats thereunder, but that since the construction of said bridge the tides have washed into said channel sand and material used in the construction of the parkway adjacent to said bridge, so that each year since said bridge was constructed your petitioner has suffered great damage by reason of said inability to use said channel uninterruptedly as theretofore; and that no provision has been made by the Commonwealth for the payment of such damages.

Wherefore, your petitioner prays for the enactment of legislation to recompense him for injury to his business and property, caused as aforesaid.

From the petition and statement of facts it appears that Sachem Brook is a small stream flowing into Quincy Bay, so called, that the tide ebbs and flows in the channel of this brook for a considerable distance, and that at low tide the channel is almost entirely drained of water. The petitioner's place of business is located on the shore of Sachem Brook, on tidewater, and at some time the Metropolitan Park Commission, by virtue of authority conferred upon it by chapter 124 of the Acts of 1904, built a drawless bridge over this brook below the plant of the petitioner. Chapter 124 is entitled "An Act to authorize the Metropolitan Park Commission to construct a drawless bridge over Sachem Brook, so called, in the Quincy Shore Reservation," and provides as follows:—

SECTION 1. The metropolitan park commission is hereby authorized to construct a drawless bridge over that part of Sachem brook, so called, in Quincy, lying within the lands acquired by said commission by takings or otherwise for Quincy shore reservation.

SECTION 2. No action shall be taken relative to the construction of said bridge until the plan therefor has been approved by the board of harbor and land commissioners.

SECTION 3. This act shall take effect upon its passage. [*Approved February 27, 1904.*]

The petitioner's place of business being located on tidewater and the bridge of which he complains having been constructed by authority of the Legislature, the question arises, has the petitioner, even though he has been injured as he claims to have been, any legal claim against the Commonwealth for damages?

Questions exactly parallel to the one under consideration have been repeatedly passed upon by the Supreme Judicial Court and have been uniformly decided against the claimants. It is said that —

The Legislature may authorize the use of public streams for any public purpose without compensating riparian proprietors thereby injured. It may cut off the access of riparian owners to the sea by authorizing the construction of a bridge, with or without a draw, or across a stream below their lands. Such authorization is the regulation of public rights and an owner has no private right in the stream even if he has enjoyed twenty years' use or if he is the only wharf owner upon it. (Nichols on Land Damages, § 5, at pp. 12-13.)

In a case in which the facts were that the petitioners owned a tidewater mill from which they alleged they had hitherto derived great emolument and advantage; that their property was damaged by the location and construction of the Boston & Maine Railroad across the mouth of the creek at the head of which their mill was situated; that the railroad company had greatly obstructed and impeded the flow of tidewater into their milldam; that by the location and construction of the railroad through the petitioners' milldam the respondents had greatly obstructed and prevented the tidewater, which overflowed the meadow and land above the pond, from flowing back into the pond; that in consequence of these obstructions the petitioners' mills could not be worked as effectually as before, and that the railroad company, by the location and construction of its road, had greatly injured the premises of the petitioners for the purposes of a wharf, the court, speaking by Chief Justice Shaw, said: —

The question was as to the right of riparian proprietors upon salt water, over an open tract of flats from which the tide wholly ebbs, and

lying between upland territory and navigable water, kept open and unobstructed for the free flow and reflow of the tidewater, for their mills or for navigation. This was a question of law, depending on the general laws of property, the colony ordinance in regard to flats, the usages of the country, and judicial decisions, and was proper to be decided as a question of law. And we are of opinion, as matter of law, that the petitioners had no right, as riparian proprietors, to have their flats kept open and unobstructed for the purposes stated, and that the jury should have been so instructed; also, that the petitioners, as tide mill owners, had no right, either as against the public or as against conterminous and adjacent proprietors, to have their flats kept open, but only to the flow of water in the channel below low-water mark, and where the tide does not ebb. The adjoining proprietor, to the extent of one hundred rods, may build solid structures, and thus obstruct the flow and reflow of the tide, without objection, provided he does not wholly cut off his neighbor's access to his house or land; and if the mill owner or conterminous proprietor suffers in consequence, it is *damnum absque injuria*. The public have a right to regulate the use of public navigable waters for purposes of passage; and the erection of a bridge with or without a draw, by the authority of the Legislature, is the regulation of a public right, and not the deprivation of any private right, which can be ground for damages. So far, therefore, as the railroad erected by authority of the Legislature affected the right of the petitioners to pass or repass to and from their lands and wharves with vessels, it was a mere regulation of a public right, and not a taking of private property for a public use, and gave the petitioners no claim for damages. (*Davidson v. Boston & Maine R. R.*, 3 Cush. 93.)

In a similar case the court again said:—

The petitioners owned the wharf and land against which the westerly end of said bridge was built, and they claimed damages for the injury to their estate by the said bridge, by impeding the access to their wharf by vessels, and by occupying the space which would have served the purpose of a vessel's berth, lying at their wharf. The judge decided that they could maintain no such claim, and rejected the evidence offered in support of it, to which the petitioners excepted. This court are of opinion that this decision was right. As we understand the facts, this bridge passes over the channel only, which is part of the public domain; being a navigable channel from which the tide does not ebb, the Legislature had the right to authorize the bridge, and did authorize both the bridge and the continuance of it. If the petitioners sustained any loss by it, it was a damage arising from a partial impediment in the use of a public right, a damage sustained by them in common with all the rest

of the community, and for which they could have no claim for damage. They had no right to occupy that part of the channel as a vessel's berth, because it was upon a public navigable stream, and if occupied in fact more extensively by them than by others, it would be by sufferance, and not as of right. (*Boston & Worcester R. R. Corp'n. v. Old Colony R. R. Corp'n.*, 12 Cush. 605.)

In another case of like character the plaintiff alleged that he owned and used a wharf and other property on Monument River, a navigable stream and arm of the sea, in the town of Sandwich, and that the defendant, on or about June 6, 1873, "wrongfully, unjustly and unlawfully built, or caused to be built and constructed a bridge, without a draw, across said river, below said land and wharf, and between it and the sea, and so low and near the river as to prevent the plaintiff from navigating said river and using said land and wharf as aforesaid; that the defendant refused and neglected, and still refuses and neglects to provide a draw in and for said bridge, although often requested so to do by the plaintiff; that, by reason of the building and constructing of said bridge, he has been prevented from using his said land and wharf for the purposes of trading and landing and shipping grain, flour, wood and various other kinds of goods, wares and merchandise, and storing the same, and mooring vessels, and for wharfage and wharf purposes generally, and for the purposes for which it was previously used, and has been and is greatly damaged and injured, and particularly has been and is greatly damaged and injured, in his said land and wharf and business." In this case the court, speaking by Chief Justice Gray, said: —

The act of the defendant, for which the plaintiff in various counts seeks compensation, is the building of a bridge across a navigable stream and arm of the sea. The direct injury alleged is to the navigation of the stream, to which the plaintiff is entitled only in common with the whole public; and the remedy for that injury is by indictment, and not by private action. The fact that the plaintiff alone now navigates the stream, or has a wharf thereon at which he carries on business, only shows that the present consequential damage to him may be greater in degree than to others, but does not show that the injury is different in kind, or that other riparian proprietors and the rest of the public may

not, whenever they use the stream, suffer in the same way. The case has no analogy to those in which an obstruction in a navigable stream sets back the water upon the plaintiff's land, or, being against the front of his land, entirely cuts off his access to the stream, and thereby causes a direct and peculiar injury to his estate, or in which the carrying on of an offensive trade creates a nuisance to the plaintiff. *Blood v. Nashua & Lowell Railroad*, 2 Gray, 137; *Lawrence v. Fairhaven*, 5 Gray, 110; *Brightman v. Fairhaven*, 7 Gray, 271; *Willard v. Cambridge*, 3 Allen, 574; *Wesson v. Washburn Iron Co.*, 13 Allen, 95; *Brayton v. Fall River*, 113 Mass. 218; *Lyon v. Fishmongers' Co.*, 1 App. Cas. 662. (*Blackwell v. Old Colony R. R. Co.*, 122 Mass. 1.)

These cases have been followed in later decisions of the Supreme Court: *Stimson v. Inhabitants of Brookline*, 197 Mass. 568, 573; *Home for Aged Women v. Commonwealth*, 202 Mass. 422, 428; *Dwyer v. New York, New Haven & Hartford R. R. Co.*, 209 Mass. 419, 421.

The petitioner states that he objected to the construction of the bridge across Sachem Brook. Even though he did object, that fact is of no legal consequence. His objection was addressed to the sound discretion and judgment of the Legislature, whose decision was final.

It is claimed that the petitioner wrote a letter in which he referred to an agreement between himself and Mr. Emery and the Metropolitan Park Commission, but it is to be noted that no one had authority to make an agreement with the petitioner on behalf of the Commonwealth; and the petitioner loses no rights by reason of any negotiations with Mr. Emery or any member of the Park Commission, because there was no process of law by which he could have prevented or even hindered the building of the bridge.

My attention has been directed to certain cases cited by counsel for the petitioner, and I have examined them, but I do not find one that is parallel to the case under consideration. In each of these cases the damage suffered was special and peculiar, while the damage alleged by the petitioner in this case is precisely the same in kind and character as that complained of in the cases hereinbefore cited, and this petitioner is subject to the rule of law established by those cases. The

damage alleged by the petitioner is caused by the interference with the navigation of Sachem Brook, a thing to which he is entitled only in common with the whole public. The fact, if it be a fact, that he alone now navigates the stream or has a boat-building establishment thereon at which he carries on business only shows that the present consequential damage to him is greater in degree than to others, but does not show that the injury is different in kind or that other riparian proprietors and the rest of the public may not suffer in the same way whenever they use the stream. In such a case a private action cannot be maintained.

I am therefore of the opinion that the petitioner has not suffered any damage for which the Commonwealth is liable.

Your first question being answered in the negative, your second question requires no further consideration.

LEGISLATURE — ELIGIBILITY OF MEMBERS TO OFFICE.

Members of the Legislature may be appointed, during their term of office, to an office not created by them during said term.

To the
Governor.
1914.
April 30.

You have requested my opinion upon the following question: —

Can the Governor lawfully appoint a member of the present Legislature to a State board or commission, as, for example, the Commission on Economy and Efficiency?

Section 21 of chapter 3 of the Revised Laws provides as follows: —

No member of the general court shall, during the term for which he is elected, be eligible to any office under the authority of the commonwealth created during such term, except an office to be filled by vote of the people.

Commenting upon this section Attorney-General Knowlton said: —

The obvious purpose of the statute is to remove from a member of the Legislature any temptation to be influenced in his vote by reason of the possibility that he may be a candidate for the place created by the Legislature of which he is a member. (I. Op. Atty.-Gen., 347.)

On May 14, 1912, Attorney-General Swift gave an opinion to the Governor on the following question: "Whether a member of the present Legislature would be eligible to appointment on the Industrial Accident Board, so called, created by an act of the Legislature of 1911, which act was amended by the Legislature of 1912." The question was raised that there was no clause in the amending bill which would exempt from its operation the provisions of section 21 of chapter 3 of the Revised Laws. I quote from Attorney-General Swift's opinion: —

The Industrial Accident Board was created by chapter 751 of the Acts of 1911. A member of this year's Legislature is, therefore, not ineligible by reason of section 21 of chapter 3 of the Revised Laws, except for appointment to an office created during the present term of the Legislature. . . . (The amendment to chapter 751 of the Acts of 1911, establishing the Board, does not in terms repeal or strike out the provisions of the act of 1911.)

. . . It, therefore, does not abolish the Board of three members created by said act of 1911, but merely creates a Board of five instead of three members by an addition of two members; nor does the change in salary and in term of office made by the amendment operate to abolish the three commissionerships created under said act of 1911. These are mere changes in detail which cannot affect the existence of the office itself. Familiar illustrations of this rule are various acts passed increasing the number of justices of our courts and increasing their salaries. It has never been contended that such amendments abolished existing offices, nor could it be successfully so contended, in my judgment. There are, therefore, three commissionerships which were created by the act of 1911 to which a member of this year's Legislature would be eligible to appointment so far as the operation of said section 21 of chapter 3 of the Revised Laws is concerned.

As the rule of law seems to me to have been stated correctly by my predecessors, I make no further comment.

CONSTITUTIONAL LAW—CORPORATIONS—RIGHTS OF MINORITY STOCKHOLDERS.

A law requiring foreign corporations doing business in Massachusetts to give minority stockholders representation on their boards of directors would be unconstitutional.

To the Com-
mittee on Bills
in the Third
Reading.
1914
May 11.

You have requested my opinion as to the constitutionality of House Bill No. 1166, which is entitled "An Act to provide that minority stockholders of corporations doing business in Massachusetts may be represented on boards of directors." Sections 1 and 2 are as follows:—

SECTION 1. Every corporation created by, or organized under, the laws of this commonwealth, and every corporation established, organized or chartered under the laws of another state or country, and engaging or continuing in any kind of business in this commonwealth, shall be subject to the provisions of this act.

SECTION 2. At the annual meeting for the election of officers of any corporation mentioned in section one, stockholders who are residents of Massachusetts and who hold stock to an amount equal in the aggregate to twenty-five per cent of the entire outstanding capital stock of the corporation, hereinafter called minority stockholders, shall have the right to nominate one director of such corporation and to have him elected as a director, provided they comply with the requirements of the succeeding sections of this act.

Sections 3 and 4 provide the methods to be pursued by the minority stockholders of a corporation to secure representation on its board of directors. The fifth and last section provides heavy penalties for violation and that any corporation that has violated any of its provisions may be enjoined from the prosecution of its business until it has complied with the provisions of this act.

Corporations are creations of the law. Their organization, control, conduct and dissolution may all be directed by statute. Since the decision of the Dartmouth College case the statutes of the Commonwealth have carefully preserved to the Legislature the right to change the provisions of law in regard to corporate rights. The Business Corporation Act, so called, enacted in 1903, provides that it shall apply—

(a) To all corporations having a capital stock and established for the purpose of carrying on business for profit heretofore or hereafter organized under general laws of the commonwealth.

(b) To all such corporations heretofore created under special laws of the commonwealth, except so far as its provisions are inconsistent with the provisions of any such special laws enacted before the eleventh day of March in the year eighteen hundred and thirty-one as are not subject to amendment, alteration or repeal by the general court.

Section 2 of this chapter provides that corporations organized under general laws shall be subject to all laws hereafter enacted which may affect or alter their corporate rights or duties or may dissolve them.

The bill before me proposes a very radical innovation in the methods heretofore and now in force in regard to the election of directors of corporations, but the regulation proposed is one that is, in my opinion, within the authority of the Legislature to make as to all domestic corporations, except such as were organized under the provisions of special laws enacted before the eleventh day of March in the year 1831, and whose charters are not subject to amendment, alteration or repeal by the General Court.

Taking up the question of applying the proposed legislation to foreign corporations doing business in this Commonwealth, it may be noted that a corporation can exist only by force of the statute or other law of the state or country in which it is created; that the laws of a state or country have no extra-territorial force and operate in another state or country only on the principle of comity, and that a corporation is conclusively presumed to be a resident of the state or country under whose law it was created. *Bank of Augusta v. Earle*, 13 Pet. 519; 19 Cyc. 1218; Thompson on Corporations, §§ 7875 and 7876.

A corporation organized under the laws of one state or country is not a citizen within that provision of section 2 of Article IV. of the Constitution of the United States which provides that "the citizens of each state shall be entitled to all privileges and immunities of citizens in the several states," nor is it within that clause of the Fourteenth Amendment to the

Federal Constitution which provides that "no state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States." A corporation, therefore, can exercise none of its functions, franchises or privileges in any State other than that in which it is organized except by the comity and consent of that other state. *Bank of Augusta v. Earle*, 13 Pet. 519; *Paul v. Virginia*, 8 Wall. 168; Clark on Corporations, 2d ed., 604.

It follows that with the exception of those foreign corporations whose business transactions in this Commonwealth are within the interstate commerce clause of the Federal Constitution the Legislature may prescribe the terms and conditions upon which they may do business here. It is within the power of a state in its discretion to exclude from its territory all foreign corporations except those whose transactions within its borders fall within the commerce clause, so called, of the Federal Constitution. Clark on Corporations, 2d ed., 605; *Myers v. Manhattan Bank*, 20 Ohio 301; *Runyan v. Coster's Lessee*, 14 Pet. 122; *Starkweather v. American Bible Society*, 72 Ill. 50.

It may be thought that a different rule should prevail as to foreign corporations that have already complied with the law of this Commonwealth, and, having received permission to do business here, have invested their capital and established themselves in business here. There is a large number of corporations of this class. In cases that have arisen where corporations have been similarly situated it has been argued that, having complied with the laws in force at the time they entered the state and having established themselves in business, the state in which they have thus lawfully established themselves cannot, without just cause, revoke the permission granted them to carry on their business within its borders. But the rule of law seems to be that a state has the absolute right entirely to exclude a foreign corporation from its territory or, having given it a license to do business within the state, to revoke it in its discretion for good cause or without any cause at all, and its motive in so doing is not open to inquiry.

Subject to the exception already noted as to interstate com-

merce, the corporation has no constitutional right to transact its business in any other state than that of its creation, and hence its exclusion therefrom violates no constitutional right. *Waters-Pierce Oil Co. v. Texas*, 177 U. S. 28; *State v. Standard Oil Co.*, 61 Neb. 28; *Doyle v. Continental Ins. Co.*, 94 U. S. 535.

A state cannot interfere with the internal affairs of a foreign corporation. It cannot direct how the officers of a foreign corporation shall be chosen. I have discussed thus at length the right of a state to exclude foreign corporations because the conditions imposed by this proposed measure of legislation, while in form directing the manner in which directors of corporations organized in other states or countries doing business here shall be elected, are in truth and in fact terms of exclusion from the Commonwealth. The terms imposed by this bill are impossible of performance by foreign corporations for the reason that such corporations must elect their directors in the manner provided by the laws of the state in which they are organized, and cannot do otherwise, for the law of that state is the very law of their being.

It has been suggested that the enactment of a statute such as is here proposed is likely to provoke retaliatory legislation by other states. While this is probably true, it does not present a constitutional objection to the bill. Its provisions are broad enough to include corporations organized and located outside the Commonwealth whose transactions within it are those of interstate commerce. In its present form this bill, so far as it relates to corporations organized prior to March 11, 1831, under special laws, and whose charters are not subject to alteration or repeal by the Legislature, is obnoxious to the provision of the Federal Constitution that "no state shall pass any law impairing the obligation of contracts." *Dartmouth College v. Woodward*, 4 Wheat. 636. And so far as its terms apply to corporations organized outside the Commonwealth, whose transactions within it are solely those of interstate commerce, it is obnoxious to the commerce clause of the Federal Constitution.

It is my opinion that this bill, if enacted, will be unconstitutional.

CONSTITUTIONAL LAW — EMINENT DOMAIN — INTERSTATE
STREAMS.

A law authorizing a city in this Commonwealth to take water from an interstate stream and providing compensation for damages to nonresidents is constitutional.

To the Com-
mittee on
Water Supply.
1914
May 18.

You have requested my opinion as to the constitutionality of House Bill No. 2279, as amended, being an act to authorize the city of Fitchburg to increase its water supply. This bill is drawn in all essential particulars in conformity with similar measures that have been enacted from time to time in this Commonwealth and makes provision for the compensation of all persons whose property may be taken under its provisions or injured by acts done under its authority.

Upon its face the bill is entirely free from any constitutional objection, but the remonstrants raise the point that it provides for a taking by right of eminent domain of the waters of the Souhegan River, an unnavigable, interstate stream, that has its source in Massachusetts and flows into New Hampshire; and that as the flow of water in that river will be greatly diminished if the proposed taking is made, and the property of riparian owners, citizens of New Hampshire, along the course of the stream in that state will be damaged thereby, the bill, if enacted, will be unconstitutional.

The bill is not obnoxious to any provision of the Constitution of this Commonwealth. It provides for compensation in damages to persons or corporations, whether within or without the Commonwealth, entitled to damages under its provisions if they fail to agree with said city as to the amount of damages sustained, and makes further specific provision for damages to parties outside the Commonwealth in the following language: —

Owners of property situated without the commonwealth which is damaged by anything done by the city under the authority of this act may file their petitions for damages in the office of the clerk of the superior court for the county of Middlesex or for the county of Worcester.

So that a remedy is provided for every one whose property is injured by the operations that may be carried on under authority of this act.

In the consideration of this question my attention has been directed to two cases: *Pine et als. v. New York City*, 112 Fed. Rep. 98 (185 U. S. 93); and *Kansas v. Colorado*, 206 U. S. 46.

In the case of *Pine et als. v. New York City* the facts were that the Legislature of the State of New York passed an act authorizing New York City to take the waters of Byram River, a non-navigable stream which has its source in the State of New York, and at some distance from its source flows into and across the State of Connecticut and empties into Long Island Sound. New York City, proceeding under the act, built a dam across Byram River in the State of New York and diverted so much of the water as to diminish greatly the flow of the stream in Connecticut, whereby the property of the plaintiffs was damaged; and as the city failed to agree with the plaintiffs as to the amount of damages they had suffered, they brought suit in equity in the Circuit Court of the United States, praying for an injunction to restrain the city from diverting the waters of that stream. The Circuit Court granted the injunction as prayed for, and the case was taken to the Circuit Court of Appeals.

The question of the constitutionality of the New York statute, while not discussed at length in the opinion rendered in the Circuit Court of Appeals, was evidently considered, for the majority opinion sustaining the decision of the Circuit Court contains the statement that "the diversion of water at one point is a taking of the property of riparian owners below the point of diversion, and falls within the constitutional protection." As above indicated, the opinion of the Circuit Court of Appeals was rendered by a divided court, one of the three judges who heard the case dissenting. Judge Wheeler, who wrote the dissenting opinion, said: —

The defendant has done nothing in question here outside of the State of New York; the deprivation of water complained of was wholly within that state; and, if the plaintiffs have any rights in the water taken, they exist within that state, and were subject to and taken under the eminent domain of that state. The plaintiffs have come into this court because they are citizens of another State, and not because their land through

which they derive their rights to the water taken is situated in another state. . . .

Thus these parties have a common interest in the water in question, which the defendant has taken under the law of the State, and not as a trespasser. It seems to be familiar law that, when an injunction is applied for to restrain such a taking, the damages will be ascertained, and the injunction withheld on making payment.

This case was then taken to the Supreme Court of the United States. That court did not take up the question of the constitutionality of the New York statute, but ruled that the plaintiffs had been guilty of laches in bringing their suit, and because of this reversed the decision of the lower court and made a decree leaving to New York City the right to continue the diversion of the water of the river, the plaintiffs to have compensation in damages. In this case it is to be remarked that the question of the constitutionality of the act authorizing New York City to take the waters of Byram River was undoubtedly before the Supreme Court. If unconstitutional, no degree of negligence by the plaintiffs in bringing their suit could have cured the defect. If the act was unconstitutional it was void from the beginning, yet the court having the question before it decided the case, not in entire accordance with the grounds of either the majority or the dissenting opinion rendered in the Circuit Court of Appeals, but upon a principle of equity that left the parties in the same position they would have occupied had the dissenting opinion of Judge Wheeler prevailed.

In the second case above mentioned the State of Kansas filed in the Supreme Court of the United States a bill in equity against the State of Colorado, alleging that the State of Colorado, acting directly by herself as well as indirectly through private persons and corporations thereto licensed by the State of Colorado, was depriving and threatening to deprive the State of Kansas of all the water heretofore accustomed to flow in the Arkansas River; that this was threatened not only by the impounding and the use of the water at the river's source but as it flows after reaching the river. It was alleged that injury was being, and

would be, thereby inflicted on the State of Kansas as an individual owner of land in the Arkansas River valley and on all the inhabitants of the State, and especially on the inhabitants of that part of the State lying in the Arkansas River valley. After disposing of certain preliminary matters the Supreme Court, speaking by Mr. Justice Brewer, said:—

Turning now to the controversy as here presented, it is whether Kansas has a right to the continuous flow of the waters of the Arkansas River, as that flow existed before any human interference therewith, or Colorado the right to appropriate the waters of that stream so as to prevent that continuous flow, or that the amount of the flow is subject to the superior authority and supervisory control of the United States. While several of the defendant corporations have answered, it is unnecessary to specially consider their defences, for if the case against Colorado fails it fails also as against them. Colorado denies that it is in any substantial manner diminishing the flow of the Arkansas River into Kansas. If that be true, then it is in no way infringing upon the rights of Kansas. If it is diminishing that flow has it an absolute right to determine for itself the extent to which it will diminish it, even to the entire appropriation of the water? And if it has not that absolute right is the amount of appropriation that it is now making such an infringement upon the rights of Kansas as to call for judicial interference? Is the question one solely between the States or is the matter subject to national legislative regulation, and, if the latter, to what extent has that regulation been carried? Clearly this controversy is one of a justiciable nature. The right to the flow of a stream was one recognized at common law, for a trespass upon which a cause of action existed.

The court further said:—

The question of the extent and the limitations of the rights of the two States becomes a matter of justiciable dispute between them, and this court is called upon to settle that dispute in such a way as will recognize the equal rights of both and at the same time establish justice between them.

Again, the court said:—

Now the question arises between two States, one recognizing generally the common-law rule of riparian rights and the other prescribing the doctrine of the public ownership of flowing water. Neither State can legislate for or impose its own policy upon the other. A stream flows

through the two and a controversy is presented as to the flow of that stream. It does not follow, however, that because Congress cannot determine the rule which shall control between the two States or because neither State can enforce its own policy upon the other, that the controversy ceases to be one of a justiciable nature, or that there is no power which can take cognizance of the controversy and determine the relative rights of the two States. Indeed, the disagreement, coupled with its effect upon a stream passing through the two States, makes a matter for investigation and determination by this court.

Referring to the principles of common law applicable to this case the court said:—

For after all, the common law is but the accumulated expressions of the various judicial tribunals in their efforts to ascertain what is right and just between individuals in respect to private disputes. As Congress cannot make compacts between the States, as it cannot, in respect to certain matters, by legislation compel their separate action, disputes between them must be settled either by force or else by appeal to tribunals empowered to determine the right and wrong thereof. Force under our system of government is eliminated. The clear language of the Constitution vests in this court the power to settle those disputes. We have exercised that power in a variety of instances, determining in the several instances the justice of the dispute. Nor is our jurisdiction ousted, even if, because Kansas and Colorado are States sovereign and independent in local matters, the relations between them depend in any respect upon principles of international law. International law is no alien in this tribunal. In *The Paquete Habana*, 175 U. S. 677, Mr. Justice Gray declared:—

International law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction, as often as questions of right depending upon it are duly presented for their determination.

And in delivering the opinion on the demurrer in this case Chief Justice Fuller said:—

Sitting, as it were, as an international, as well as a domestic tribunal, we apply Federal law, State law, and international law, as the exigencies of the particular case may demand.

In the further discussion of the case and of the evidence submitted the court said:—

It cannot be denied in view of all the testimony . . . that the diminution of the flow of water in the river by the irrigation of Colorado has worked some detriment to the southwestern part of Kansas, and yet when

we compare the amount of this detriment with the great benefit which has obviously resulted to the counties in Colorado, it would seem that equality of right and equity between the two States forbids any interference with the present withdrawal of water in Colorado for purposes of irrigation.

In finally disposing of this case the court said: —

The decree will also dismiss the bill of the State of Kansas as against all the defendants, without prejudice to the right of the plaintiff to institute new proceedings whenever it shall appear that through a material increase in the depletion of the waters of the Arkansas by Colorado, its corporations or citizens, the substantial interests of Kansas are being injured to the extent of destroying the equitable apportionment of benefits between the two States resulting from the flow of the river.

The case of *Brickett v. Haverhill Aqueduct Co.*, 142 Mass. 394, was an action of tort for diverting and obstructing a watercourse, thereby preventing water from flowing through the plaintiff's land. The diversion of the water occurred in Massachusetts. The plaintiff was a citizen of Massachusetts, but the property alleged to have been injured was located in New Hampshire. The court in that case, speaking by Chief Justice Morton, said: —

We do not deem it important that the land of the plaintiff which was injured was outside of the limits of this State. The language of the act is general, and puts all water rights upon the same footing, and applies to a proprietor outside the State. Such proprietor certainly has no greater rights than the citizen whose lands or water rights within the State are injured by the acts of the defendant under the authority of the Legislature.

The rule of the common law as to the rights of riparian owners has been frequently stated, and may be expressed in the following language: —

The primary right of every riparian proprietor is to have the natural and customary flow of the stream without obstruction or change.

This primary right is subject to the modification that —

The right to flowing water is now well settled to be a right incident to property in the land; it is a right *publici juris*, of such a character that whilst it is common and equal to all through whose land it runs, and no

one can obstruct or divert it, yet, as one of the beneficial gifts of Providence, each proprietor has a right to a just and reasonable use of it as it passes through his land; and so long as it is not wholly obstructed or diverted, or no larger appropriation of the water running through it is made than a just and reasonable use, it cannot be said to be wrongful or injurious to a proprietor lower down.

This is the rule between persons who are riparian proprietors on the same stream, and it prevails until a public necessity arises, when, like every other individual right of property, it gives way to the public need. In some of the western States, as shown by the case of *Kansas v. Colorado*, the common-law rule, even as applied to interstate streams, yields and is modified by the great necessity of irrigating vast tracts of arid and desert land; and even though the public necessity arises in another State, the rule as to private ownership yields to it. The irrigation of waste and desert lands in Colorado may be, and undoubtedly is, a matter of transcendent importance, but who can measure or estimate the importance of an adequate supply of pure water for the use of the crowded, evergrowing industrial centers of the east? If the common-law rule yields as to interstate streams in the one case, it certainly ought to yield in the other. In each case the rule as to individual owners should yield to public necessity.

It has been suggested that the city of Fitchburg does not need this supply. Of this question the Legislature must be the judge. In passing upon the question submitted to me I assume that the need exists.

It has been further suggested that in the case of *Kansas v. Colorado*, above cited, the State of Kansas was not an individual owner, and that the case did not therefore decide the issues that would be involved in a suit by a citizen of Kansas against the State of Colorado; but, as I have stated above, Kansas in its bill of complaint set up the fact that it was an owner of land in the Arkansas valley which was damaged by the operations of Colorado. The court itself noted the fact that "Kansas asserts a pecuniary interest as owner of certain tracts along the banks of the Arkansas River, and as the owner of the bed of

the stream." *Kansas v. Colorado*, 206 U. S. at p. 98. But the court, in view of the fact that its jurisdiction might be invoked by the State, as *parens patriæ*, trustee, guardian or representative of all or a considerable portion of its citizens, deemed it unnecessary to stop to consider especially the rights of private ownership.

The objection to this bill seems to grow out of the idea that each State is a sovereign power. To a limited extent this is true; but however complete the rights and attributes of sovereignty of the States may have been before they entered the Union, there can be no question that when they entered the Union large and important attributes of sovereignty were surrendered by the States. The States may not lay any imposts or duties on imports or exports; may not make war upon each other or upon a foreign country; may not make treaties with each other or with foreign countries, and in cases of differences of a justiciable nature between them the Supreme Court of the United States is empowered to adjudicate between them. *Rhode Island v. Massachusetts*, 12 Pet. 657; *Missouri v. Illinois*, 180 U. S. 208; *Kansas v. Colorado*, 206 U. S. 46.

In a word, the States of this Union form a nation.

If this bill passes and the waters of the Souhegan River are taken by the city of Fitchburg, citizens of New Hampshire whose property is injured by the taking, by reason of diverse citizenship, may at their election bring action under the provisions of this bill in the courts of the Commonwealth, or may bring suit in the District Court of the United States against the city, or may induce the State of New Hampshire to bring suit in the Supreme Court of the United States against this Commonwealth. I repeat that this bill does not present the case of taking or injuring the property of any person and leaving him without a remedy. This measure is in harmony with other legislation of this Commonwealth in regard to securing a water supply for cities, notably, with the legislation providing for the taking of the south branch of the Nashua River, an interstate stream, as a supply for the metropolitan water district. If this bill is unconstitutional, the metropolitan

water act, being chapter 488 of the Acts of 1895, was and is unconstitutional, and the acts done under its provisions were without authority.

In view of the trend of judicial decisions and of the course of legislation in this Commonwealth, which have been for years unchallenged, I am of the opinion that this bill, if enacted, will be constitutional.

CONSTITUTIONAL LAW—FREEDOM OF CONTRACT—PLUMBERS.

A law providing that permits to perform plumbing work shall be issued only to master plumbers and that all work done thereunder shall be performed only by master plumbers or their designated journeymen plumbers would be unconstitutional.

To the
Senate.
1914
May 21.

You have requested my opinion upon the following question of law: —

Is it within the constitutional power of the General Court to enact a law providing that permits to perform plumbing work shall be issued only to master plumbers, and that all work done under such permits shall be performed only by the master plumber himself or by such journeymen plumbers as he may directly employ and supervise?

You have submitted with your inquiry a copy of House Bill No. 1347, entitled "An Act relative to the supervision of plumbing."

The question of constitutionality arises in regard to the first and second sections of the bill, which read as follows: —

SECTION 1. The words "master plumber," as used in chapter one hundred and three of the Revised Laws, shall be deemed to mean a person who holds a Massachusetts state master plumber's license or certificate, and who has a regular established place of business conveniently situated and open for business during regular business hours, and who himself or by journeymen in his employ performs plumbing work for property owners, agents or tenants.

SECTION 2. Permits to perform plumbing work shall be issued only to master plumbers as herein defined, and all work done under such permit shall be performed by the master plumber himself or by such journeymen plumbers as he may directly employ and supervise.

A "journeyman" is defined as a workman or mechanic who has served his apprenticeship, specifically, a qualified mechanic employed in the exercise of his trade as distinguished from a master mechanic or foreman.

This bill, if enacted, would prevent a journeyman plumber from making a contract to put the plumbing into a building or taking any other job of plumbing whatever, for the reason that no permit to do the work could lawfully be issued to him. And the bill goes further and prevents a master plumber who is so unfortunate as not to have a regular established place of business kept open for business during regular business hours, from making contracts for plumbing; and master plumbers who have regular places of business kept open for business during regular business hours, and whose places of business are not conveniently situated, are not to be regarded as master plumbers under the provisions of this bill, and would also fall within its prohibition. Thus this bill is not for a whole class, but its evident aim and object are to create a class within a class; that is, out of those who hold licenses as master plumbers it proposes to create a class of master plumbers.

Article I. of Part the First of the Constitution of this Commonwealth declares:—

All men are born free and equal, and have certain natural, essential and unalienable rights; among which may be reckoned the right of enjoying and defending their lives and liberties; that of acquiring, possessing, and protecting property; in fine, that of seeking and obtaining their safety and happiness.

There are certain fundamental rights of every citizen which are recognized in the organic law of all our free American States. A statute which violates any of these rights is unconstitutional and void, even though its enactment is not expressly forbidden. *Commonwealth v. Perry*, 155 Mass. 117.

Under the police power, legislation to protect the health, morals or safety of the community may be enacted, but that power does not extend beyond these limits, and such legislation must bear a genuine relation to some one of the three subjects

named. It necessarily follows that only such regulations will be sustained as are in fact necessary to the preservation of the public health, morals or safety, and the courts will declare arbitrary provisions invalid. *Cotter v. Doty*, 5 Ohio, 393.

If, then, it be admitted that for the preservation of the public health men who seek to work at the business of plumbing should be required to pass an examination and procure a license, it comes far short of justifying an interference with the way in which a man who has passed the examination and obtained a license shall conduct his business. Nor does such an admission afford a reason for prohibiting such a man from carrying on his business as he sees fit in regard to location and in every other particular, so long as he is within the law.

This proposed bill, if enacted, will interfere with the freedom of contract of journeymen plumbers, and, as above indicated, of certain master plumbers and of such property owners as may desire to make a contract for plumbing with a journeyman plumber or with a master plumber who has no regular place of business or whose place of business may, in the judgment of some one whose personality is not disclosed by the bill, be inconveniently located.

Freedom of contract is not expressly mentioned in the Constitution, but the Supreme Judicial Court has declared that the right to acquire, possess and protect property, as set forth in Article I. of the Constitution, above quoted, includes the right to make reasonable contracts which shall be under the protection of the law. *Commonwealth v. Perry*, 155 Mass. 117. The Constitution declares that all men have an unalienable right of seeking and obtaining their safety and happiness. Included in this right is the right to liberty in the choice of occupation, and to conduct and advertise it in any legitimate manner and subject only to such restraints as are necessary to the health, morals and safety of the community. *Slaughter-House Cases*, 16 Wall. 36; *Dexter v. Blackden*, 93 Me. 473; *People v. Coldwell*, 168 N. Y. 671; *Allgeyer v. Louisiana*, 165 U. S. 578.

"Liberty," as that term is used in the Constitution, means

not only freedom of the citizen from servitude and restraint, but embraces the right of every man to be free in the use of his powers and faculties and to adopt and pursue such avocation or calling as he may choose, subject only to the restraints necessary to secure the common welfare. *Frorer v. People*, 141 Ill. 171; *Commonwealth v. Perry, supra*; *People v. Gillson*, 109 N. Y. 389; *Ruhstrat v. People*, 49 L. R. A. 181.

Our Supreme Judicial Court has said:—

Constitutional liberty means “the right of one to use his faculties in all lawful ways, to live and work where he will, to earn his livelihood in any lawful calling, and to pursue any lawful trade or avocation.” (*O’Keeffe v. Somerville*, 190 Mass. 110.)

To be a master plumber within the provisions of this proposed measure one must have a regular established place of business conveniently situated. To whom must it be conveniently situated? Whose convenience is referred to in the bill? Whose convenience must a man consult in setting up his plumber’s shop and whose judgment is to prevail as to whether the business is conveniently situated or not? This provision, if enacted, will constitute a gross violation of the constitutional guaranty of personal liberty.

Article IV. of Section I. of Chapter I. of Part the Second of the Constitution confers authority on the General Court to make, ordain and establish all manner of wholesome and reasonable orders, laws, statutes and ordinances. The provision of this bill last referred to is so clearly unreasonable as, in my opinion, to be inimical to this provision of the Constitution.

It is my opinion that your question must be answered in the negative, and that this bill, if passed, will be unconstitutional.

WORKMEN'S COMPENSATION ACT — CITIES AND TOWNS —
GYPSY AND BROWN-TAIL MOTH SUPPRESSION.

The Commonwealth is not required to reimburse cities and towns which have adopted the workmen's compensation act and have incurred expenses on account of injuries sustained by employees while employed in suppression of gypsy and brown-tail moths.

To the Auditor
of the Common-
wealth.
1914
May 25.

You have requested my opinion on the following question: —

Are cities and towns that have adopted the workmen's compensation act entitled to be reimbursed for expenses incurred by them on account of injuries sustained by their employees while employed in the suppression of gypsy and brown-tail moths?

Section 1 of chapter 521 of the Acts of 1907 provides that —

When any city or town shall have expended within its limits city or town funds to an amount in excess of five thousand dollars in any one fiscal year, in suppressing gypsy or brown-tail moths, the commonwealth shall reimburse such city or town to the extent of fifty per cent of such excess above said five thousand dollars.

A more liberal rule as to small towns is established by statute.

By section 6 of chapter 807 of the Acts of 1913, providing for the adoption of the workmen's compensation act by certain cities and towns, the following provision is made in regard to employees of the Commonwealth: —

For the purposes of this act all laborers, workmen and mechanics paid by the commonwealth, but serving under boards or commissions exercising powers within defined districts, shall be deemed to be in the service of the commonwealth.

From your inquiry it appears that laborers or workmen engaged in the suppression of gypsy or brown-tail moths in cities and towns are employed by such cities and towns, and are neither employed nor paid by the Commonwealth. The State is therefore under no obligation to pay for injuries sustained by such laborers unless such expense is authorized by chapter 521 of the Acts of 1907, and that act, in my opinion,

does not contain such a provision. The Commonwealth is required under the law to reimburse cities and towns to the extent of 50 per cent. of the excess above \$5,000 expended by them for suppressing gypsy or brown-tail moths, not for expenses incurred by reason of injury to an employee. It is my opinion that your question must be answered in the negative.

MINORS — HOURS OF LABOR — LIABILITY OF EMPLOYERS AND PARENTS.

Under St. 1913, c. 831, an employer of a minor who has been duly notified that such employee is being employed for a greater number of hours per week than is authorized by statute is criminally liable.

Under said c. 831, a parent, guardian or custodian of a minor employed for a greater number of hours per week than is authorized by statute is criminally liable without notice.

You request my opinion upon the following question: —

To the
State Board
of Labor and
Industries.
1914
May 25.

May a minor, under sections 8 and 9 of chapter 831 of the Acts of 1913, work six days in one establishment and on the seventh day work for another employer in connection with another mercantile establishment? For example, may a minor fifteen years of age work six days a week, with a total of forty-eight hours, for a department store, and on the seventh day work six hours in connection with a mercantile establishment at a summer resort?

I assume from the wording of your question that the two employers are entirely independent of each other, that neither has any interest whatever in the business of the other, and that there is no collusion between them. You do not state (and I therefore assume) that the employer for whom the boy works on Sunday has not had any notice that the boy has been employed regularly during the six working days of the week.

Under such circumstances there can hardly be any criminal liability on the part of either employer.

You do not state whether the boy in question has any parent, guardian or custodian. Under the circumstances I beg

to direct your attention to sections 20 and 23 of chapter 831 of the Acts of 1913, which provide as follows:—

SECTION 20. Any person who, whether by himself or for others, or through agents, servants or foremen employs, induces or permits any minor to work contrary to any of the provisions of this act, shall be deemed guilty of a misdemeanor, and shall, for a first offence, be punished by a fine of not less than ten dollars nor more than fifty dollars, or by imprisonment for not more than thirty days, or by both such fine and imprisonment; and for a second or subsequent offence, by a fine of not less than fifty dollars nor more than two hundred dollars or by imprisonment for not more than sixty days, or by both such fine and imprisonment.

The employment of any minor in violation of any provision of this act after the person employing such minor has been notified thereof in writing by any authorized inspector, school attendance officer or truant officer, shall constitute a separate offence for every day during which the employment continues.

SECTION 23. Any parent, guardian or custodian having a minor under his control, who compels or permits such minor to work in violation of any provision of this act, or who knowingly certifies to any materially false statement for the purpose of obtaining the illegal employment of such minor, shall be deemed guilty of a misdemeanor, and, upon conviction, shall for the first offence be punished by a fine of not less than two dollars nor more than ten dollars, or by imprisonment for not more than five days, or by both such fine and imprisonment; and for a second or subsequent offence he shall be punished by a fine of not less than five dollars nor more than twenty-five dollars, or by imprisonment for not more than ten days, or by both such fine and imprisonment.

By causing the proper notice to be given under section 20 to the employer for whom the boy works on Sunday, it seems clear that you would make that employer liable if he did not cease to employ the boy on that day. The parent, guardian or custodian of the boy would seem to be liable without any notice from an inspector or other official.

CONSTITUTIONAL LAW — BOSTON TRANSIT COMMISSION —
EXTENSION OF TERM OF OFFICE BY LEGISLATURE.

It is within the constitutional authority of the Legislature to extend the term of office of officers created by an act of the Legislature.

You have requested my opinion as to the constitutionality of Senate Bill No. 102, entitled "An Act to extend the term of office and to define the duties of the members of the Boston Transit Commission," which provides as follows: —

To the House
of Repre-
sentatives.
1914
May 26.

SECTION 1. The term of office of the members of the Boston transit commission is hereby extended for three years from the first day of July in the year nineteen hundred and fourteen.

SECTION 2. The powers, duties and compensation of said commission during said term of three years shall be the same as are specified in chapter five hundred and forty-eight of the acts of the year eighteen hundred and ninety-four and in acts in amendment thereof or in addition thereto, except as hereinafter provided. Any vacancy in said commission shall be filled in the manner provided in said chapter five hundred and forty-eight.

It is suggested that this bill, if enacted, may interfere with the executive functions of the Governor.

The Governor is the supreme executive magistrate of the Commonwealth. Mass. Const., c. II., § I., art. I. But the power to make appointments is not necessarily a function of or an appurtenance to the executive office. In the Constitutions of the States of the Union there appears to be no distinct rule as to the distribution of authority to make appointments to office. Some States confer upon the Executive a much larger measure of power in this respect than others. The Constitution of this Commonwealth provides that all judicial officers shall be nominated and appointed by the Governor by and with the advice and consent of the Council. Mass. Const., c. II., § I., art. IX. The fourth amendment to the Constitution provides that notaries public shall be appointed by the Governor in the same manner as judicial officers are appointed. The Governor is also given power under certain circumstances to make appointments to fill vacancies in certain executive offices.

The Constitution confers upon the Legislature large powers in the matter of appointments to civil office. By Article IV. of Section I. of Chapter I. of the Constitution full power and authority are given and granted to the General Court —

. . . to name and settle annually, or provide by fixed laws for the naming and settling, all civil officers within the said commonwealth, the election and constitution of whom are not hereafter in this form of government otherwise provided for.

Since the adoption of the Constitution the Legislature has in repeated instances enacted laws changing the term or tenure of a civil office. Several of these acts have been carried to the Supreme Judicial Court in litigation, and the constitutionality of legislation of this kind has always been sustained.

In the case of *Taft v. Adams*, 3 Gray, 126, Chief Justice Shaw said: —

* Where an office is created by law, and one not contemplated, nor its tenure declared by the Constitution, but created by law solely for the public benefit, it may be regulated, limited, enlarged or terminated by law, as public exigency or policy may require.

See, also, *Opinion of the Justices*, 117 Mass. 603, 604; *Donaghy v. Macy*, 167 Mass. 178; *Opinion of the Justices*, 165 Mass. 599.

In *Barnes v. Mayor of Chicopee*, a case in which the plaintiff sought to be reinstated in the office of chief of police of the city of Chicopee, from which he claimed to have been removed wrongfully, Chief Justice Rugg said: —

It is within the power of the Legislature to lengthen or shorten the tenure of such an office or to place its incumbents under operation of the civil service law. (*Barnes v. Mayor of Chicopee*, 213 Mass. 1.)

In a New York case it was said that —

Where an office is created by statute it is wholly within the control of the Legislature. The term, the mode of appointment and the compensation may be altered at pleasure. (*Connor v. City of New York*, 2 Sandford, 355.)

This case was affirmed by the Court of Appeals of the State of New York. (1 Selden, 285.)

While these cases may not be precisely in point, they indicate the trend of judicial opinion upon questions very similar in character to the one presented by this bill.

The offices of the members of the Boston Transit Commission are not among those named in the Constitution but fall within the class of civil officers specified in Article IV. of Section I. of Chapter I. of the Constitution, above quoted. This commission was created, not by the Constitution itself but by act of the Legislature.

The result of my examination of this question and of the authorities is that this bill, if enacted, will not interfere with any constitutional right or function of the Governor.

• —————

CITIES AND TOWNS — MUNICIPAL DEBTS — BONDS AND NOTES.

A town or city has no authority to issue notes or bonds for the purpose of refunding sums of money previously raised and expended for municipal purposes.

You have submitted copies of the records of certain votes passed by town meetings of the town of Swampscott, and among others, of a vote adopted at the last annual town meeting of that town, and have asked to be advised whether you may properly construe the statute as permitting the town to incur indebtedness under the vote passed at the annual town meeting held Feb. 16, 1914. The warrant for that meeting contained the following article: —

To the
Director of
the Bureau of
Statistics.
1914
June 10.
—

Article 41. — To see if the town will vote to refund to the treasury the sum of \$4,200 expended for laying water pipes in Crosman Avenue and for replacing water pipes on Galloupe's Point, and making appropriations therefor.

Under this article the town voted —

To adopt the report of the ways and means committee appropriating the sum of \$4,200 for the purpose of refunding to the treasury the amount expended in laying water pipes in Crosman Avenue and replacing the water pipes at Galloupe's Point, and that this sum be raised by the issuance of notes or bonds of the town.

Sections 5 and 6 of chapter 719 of the Acts of 1913 and chapter 634 of the Acts of 1913 specify the purposes for which cities and towns may incur debt other than temporary loans; and section 7 of chapter 719 which prohibits the incurring of debt by cities and towns for purposes other than those specified by statute reads as follows: —

Cities and towns shall not incur debt for any purpose or for any period of time other than as specified in this act or in chapter six hundred and thirty-four of the acts of the year nineteen hundred and thirteen, and the proceeds of any sale of bonds or notes, except premiums, shall be used only for the purposes specified in the authorization of the loan: *provided, however*, that transfers of unexpended amounts may be made to other accounts to be used for similar purposes.

The purpose for which it is proposed to incur this indebtedness is not one specified or permitted by the statute, and falls clearly within the prohibition of section 7 last above quoted.

The case presented by your inquiry seems to afford a very close parallel to the case of *Chapin et al. v. Town of Lincoln*, recently decided by the Supreme Judicial Court. In that case the tenth article of the warrant for the town meeting held by adjournment in the town of Lincoln on March 8, 1913, was as follows: —

To see if the town will issue water bonds pursuant to the Acts of 1907, chapter 476, and reimburse the treasury on account of money paid from the treasury pending an issue of bonds on account of payments for water construction purposes.

Under this article it was voted —

That the town treasurer be authorized and directed to issue the bonds of the town for the sum of \$6,000, each bond to be for \$500.

In its opinion in this case the court said: —

The single justice has made a finding that the purpose of issuing bonds under this vote was to reimburse the town for sums that had been appropriated in earlier years for three extensions of the water works of the town: one of the extensions having been made under an article of the annual meeting of March, 1911, and the other two under articles of the

annual meeting of March, 1912. And he has expressly found that all of these extensions "had been made and paid for before the vote of March 8, 1913, from money raised by taxation."

In neither of these three instances did the town express any intention to provide funds for the proposed municipal improvement by borrowing money under its water acts. Sts. 1872, c. 188; 1907, c. 476. It did not even undertake to vote that the money in the town treasury should be used temporarily for water purposes "pending an issue of bonds," as it appears to have done on some other occasions. In fact, in the second and most important case, when it appropriated \$4,267, specific provision was made for the payment of this sum without an issue of bonds, namely, by using the special water works sinking fund and the receipts from the water works.

There is no indebtedness incurred or contemplated by the town to warrant the proposed loan. There is no unfunded debt on account of the extensions referred to. It does not follow that because the town might have borrowed money for these extensions at the time they were voted, it can do so now after they are paid for. See St. 1913, c. 719, as amended by St. 1914, c. 143. . . .

We are in accord with the opinion of the single justice, that an injunction should issue as prayed for, restraining the respondents from issuing bonds under the vote passed March 8, 1913.

This statement of the law covers very fully your inquiry. So far as appears from the statement of facts accompanying your inquiry the town of Swampscott, like the town of Lincoln in the case above referred to, has incurred no indebtedness nor is any contemplated to justify the proposed loan. In the Swampscott case, as in the Lincoln case, the purpose is to refund or reimburse the treasury for money already expended, which, as above stated, is not one of the purposes for which the statute permits indebtedness to be incurred.

In matters of this kind the only safe rule is the rule of strict construction. Municipal corporations are simply agencies of government for certain well-defined purposes and discharge such functions only as are conferred upon them by law. To permit the issue of commercial paper by towns and cities for purposes not authorized by statute would expose investors to loss and taxpayers to the expense of tedious and vexatious litigation.

It is my opinion that your question must be answered in the negative.

STATE BOARD OF EDUCATION — TEXTILE SCHOOLS.

The Commissioner of Education has statutory powers over all educational work supported in whole or in part by the Commonwealth, including textile schools.

To the Com-
mission on
Economy and
Efficiency.
1914
June 10.

You have requested my opinion as to the nature and scope of the supervisory powers possessed by the State Board of Education, with special reference to State aided or supported textile schools, and as to the need of further legislative definition of such supervisory powers.

The supervisory powers of the State Board of Education over textile schools seem to be vested in the Commissioner of Education and his deputies. Chapter 421 of the Acts of 1913 provides as follows:—

The board shall appoint a commissioner of education whose term of office shall be five years, and may fix his salary at such sum as the governor and council shall approve. Said commissioner may at any time be removed from office by a vote of six members of the board. He shall exercise the powers and perform the duties now conferred or imposed by law on the secretary of the board of education. He shall be the executive officer of the board, shall have supervision of all educational work supported in whole or in part by the commonwealth, and shall report thereon to the board, and, when so authorized by the board, may approve bills for expenditures from appropriations and funds placed under the direction of the board. The board shall also appoint two deputy commissioners, one of whom shall be especially qualified to deal with industrial education. The powers, duties, salaries and terms of office of said deputy commissioners shall be such as may be established from time to time by the board, but the board may, by a vote of six members thereof, remove from office at any time either of said deputy commissioners. The board may be allowed for rent, salaries of the commissioner, the deputies, agents, assistants and clerical service, and for travelling and other necessary expenses of the commissioner, the deputies, agents, and of the board incurred in the performance of their official duties, such sum as shall be appropriated by the general court annually, payable out of the treasury of the commonwealth.

This statute gives the Commissioner of Education ample supervisory powers over all educational work supported in whole or in part by the State, which certainly includes textile

schools, whether supported wholly by the State or receiving aid therefrom, and by this statute it is made a part of the duty of the Commissioner of Education to report to the State Board upon all educational work under his supervision.

The statute provides for two deputy commissioners of education and requires that one shall be especially qualified to deal with industrial education. While this phrase undoubtedly applies to schools devoted to vocational education, so called, in the various cities and towns, it also includes textile schools.

There is now certainly sufficient statutory authority to warrant the Commissioner of Education in supervising and making report upon textile schools. The question of the need of further legislation in regard to this matter is for the Legislature to determine, and not for this department.

CONSTITUTIONAL LAW — GREAT PONDS — REGULATION OF THE PRICE OF ICE.

A law authorizing a commission to fix the price at which ice shall be sold when it has been taken from great ponds of the Commonwealth or from bodies of water under the control of such commission would be constitutional.

You have requested my opinion upon the following question: —

To the Senate.
1914
June 12.

Is it within the constitutional power of the General Court to enact a law authorizing a board or commission of the Commonwealth to fix the price at which ice shall be sold to families by individuals or corporations, when such ice has been taken from ponds or other bodies of water under the supervision and control of said board or commission?

In making answer to your inquiry two questions are presented for examination: First, as to rights of individual ownership, if any, in the public waters, chiefly and perhaps entirely for the purposes of your inquiry in great ponds of the Commonwealth; and second, as to the extent of the authority of the Legislature over these bodies of water.

The title to the great ponds was taken by the sovereign

power, and their use granted to the people by a very early colonial ordinance, and, except for certain special grants, has remained to this day as it was fixed by the colonial ordinance.

By section 16 of the Bodie of Liberties, supposed to have been enacted in 1641, it was provided that —

Every Inhabitant that is an howse holder shall have free fishing and fowling in any great ponds and Bayes, Coves and Rivers, so farre as the sea ebbes and flowes within the presincts of the towne where they dwell, unlesse the free men of the same Towne or the Generall Court have otherwise appropriated them, provided that this shall not be extended to give leave to any man to come upon others proprietic without there leave.

This ordinance was at some time between 1641 and 1647 amended so as to provide: —

Every Inhabitant who is an householder shall have free fishing and fowling in any great ponds, bayes Coves and Rivers, so farr as the Sea ebbs and flowes, within the precincts of the towne where they dwell, unles the freemen of the same Town or the General Court have otherwise appropriated them. Provided that no Town shall appropriate to any particular person or persons, any great Pond containing more than ten acres of land, and that no man shall come upon anothers propriety without their leave otherwise then as hereafter expressed. The which clearly to determine, It is Declared, That in all *Creeks, Coves* and other places, about and upon *Salt-water*, where the Sea ebbs and flowes, the proprietor of the land adjoining, shall have propriety to the low-water-mark, where the Sea doth not ebb above a hundred Rods, and not more wheresoever it ebbs further. Provided that such proprietor shall not by this liberty, have power to stop or hinder the passage of boates or other vessels, in or through any Sea, Creeks or Coves, to other mens houses or lands. And for great Ponds lying in common, though within the bounds of some Town, it shall be free for any man to fish and fowle there, and may pass and repass on foot through any mans propriety for that end, so they trespass not upon any mans Corn or Meddow.

From the time of this later enactment great ponds in this Commonwealth have been and still are public property. Efforts have been made from time to time by individuals to establish rights of private ownership in great ponds, and cases involving claims of private ownership have in repeated instances been carried to the Supreme Judicial Court.

In the case of *Fay v. Salem & Danvers Aqueduct Co.*, 111 Mass. 27, the petitioner sought to recover damages for the taking of water from Spring Pond, a pond having an area of about sixty acres, for its aqueduct, whereby the dwelling house of the petitioner situated on the shore of said pond would become uncomfortable and unfit for habitation. The court held that "by the law of Massachusetts great ponds are public property," and further said that the petitioner had no title "except that derived from deeds of lands partly surrounding the pond on the side opposite the outlet, and bounded 'by the pond.' The title acquired by such deeds extended only to low-water mark, and did not affect the rights of the public in the pond," and dismissed the petition.

In another case action was brought by certain private parties seeking to restrain another individual from cutting and harvesting ice in Fresh Pond, which has an area of about one hundred and eighty-three acres. It appeared that the riparian owners of the entire shore of Fresh Pond had, by agreement among themselves, apportioned to each a certain part of the area of the pond; that these proprietors generally cut ice to be shipped and also to supply the local demand, and that the business was very large, at times more than a thousand men being employed. The Supreme Judicial Court declared that —

By the law of Massachusetts, great ponds, not appropriated before the colony ordinance of 1647 to private persons, are public property, the right of reasonably using and enjoying which, for taking ice for use or sale, as well as for fishing and fowling, boating, skating, and other lawful purposes, is common to all, and in the water or ice of which, or in the land under them, the owners of the shores have no peculiar right, except by grant from the Legislature, or by prescription, which implies a grant. *Anc. Chart.* 148. *Cummings v. Barrett*, 10 Cush. 186; *West Roxbury v. Stoddard*, 7 Allen, 158; *Paine v. Woods*, 108 Mass. 160; . . . *Fay v. Salem & Danvers Aqueduct Co.*, 111 Mass. 27. (*Hittinger v. Eames*, 121 Mass. 539.)

In the case of *Rockport v. Webster*, 174 Mass. 385, the town of Rockport, having taken the waters of Cape Pond for a water supply, sought to prevent the defendant from taking ice therefrom. The defendant replied that he had been for years a

riparian owner of land upon the shore of said pond, with an established ice business thereon consisting of cutting and preparing ice for sale. In the discussion of this phase of the case the Supreme Judicial Court said:—

While it is true that the defendant is a riparian owner of lands upon the shores of the pond, with an established business of cutting and storing ice for sale, still, in the absence of any grant from the Legislature, or by prescription, he has no peculiar right thus to cut ice, and he must stand or fall in that respect with the general public. *Hittinger v. Eames*, 121 Mass. 539. (*Rockport v. Webster*, 174 Mass. 385, 390.)

To the effect that there are no private rights of property in great ponds is the case of *Sprague v. Minon*, 195 Mass. 581.

The authorities are uniform and entirely conclusive against the assertion of rights of private ownership in any of the great ponds; and there is therefore no constitutional objection to the proposed regulation upon the ground that it may interfere with private ownership.

Taking up the question as to the authority of the Legislature to enact the proposed legislation, it again appears that a considerable number of cases involving this right have been passed upon by the Supreme Judicial Court.

In the case of *Fay v. Salem & Danvers Aqueduct Co.*, above cited, the court declared not only that great ponds are public property, but that their use for "taking water or ice, as well as for fishing, fowling, bathing, boating or skating, may be regulated or granted by the Legislature at its discretion."

In repeated instances the Commonwealth has leased the fishing rights in great ponds to certain individuals to the exclusion of all others. In passing upon a case in which the defendant set up his right to fish in a great pond in disregard of such a lease executed by the Commonwealth, the Supreme Judicial Court, referring to the ordinance hereinbefore quoted, said:—

This ancient ordinance, in its amended form, is the foundation of our law upon this subject. While it prohibits the towns from granting away great ponds, it expressly affirms their power to regulate the fisheries, both in such ponds and in tidewaters, and that of the Legislature to

dispose either of great ponds (as well of bays, coves and rivers within the ebb and flow of the tide), or of the common rights of fishing and fowling in them. It has ever since been held that the right of fishing, both in the tidewaters and in the great ponds, belongs to the public, unless otherwise appropriated by the Legislature, or by the towns acting under its authority.

In the further discussion of this question the court said:—

The power of the Legislature of the Commonwealth over the public rights of navigation and fishing in any waters within its boundaries is unrestricted, provided it does not interfere with the power to regulate commerce, conferred upon the general government by the Constitution of the United States. *Cooley v. Philadelphia Board of Wardens*, 12 How. 299; *Gilman v. Philadelphia*, 3 Wallace, 713. The Legislature of a State has the power to regulate the time and manner of fishing in the sea within its limits; and, according to the opinions of most respectable judges, may even grant exclusive rights of fishing at particular places in tidewater. *Burnham v. Webster*, 5 Mass. 266; *Dunham v. Lamphere*, 3 Gray, 268; *Smith v. Maryland*, 18 How. 71. . . . In those waters, whether within or beyond the ebb and flow of the tide, which are not navigable from the sea for any useful purpose, there can be no restriction upon its authority to regulate the public right of fishing, or to make any grants of exclusive rights which do not impair other private rights already vested. *Nickerson v. Brackett*, 10 Mass. 212; *Cleveland v. Norton*, 6 Cush. 380; *Russell v. Russell*, 15 Gray, 159. (*Commonwealth v. Vincent*, 108 Mass. 441.)

In many instances the Legislature has granted the control of the waters of great ponds to corporations, with authority to sell the water for domestic use. The right of the Legislature to regulate the price at which water from a great pond may be sold by such a corporation appears to be recognized fully in the case of *Gardner Water Co. v. Inhabitants of Gardner*, 185 Mass. 190. The facts in that case, briefly stated, were that the Gardner Water Company, having established itself in the business of taking water from Crystal Lake and selling it to the residents of Gardner, and the town desiring to take over the corporate property of the water company, a board of commissioners was appointed to ascertain and determine the value of the corporate property. The commissioners reported that the corporation—

was entitled, whenever the town of Gardner should take advantage of the option of purchase granted to it by section 9, to the fair value at that time of the right to use and sell the waters of Crystal Lake (and any other waters that may have been acquired by the company under the provisions of sections 2 and 3) for the purpose of furnishing the inhabitants of the town of Gardner with water for the purposes enumerated in section 1; subject to the right of the State to regulate the rates charged by the company (but not to establish rates so low as to be obnoxious to the provisions of the State or Federal Constitutions), to authorize competition (either public or private) from water sources other than those held by the company, to revoke the company's right to use the public ways of Gardner for its pipes and hydrants (thus leaving the company with the right only to sell its waters wholesale to a distributing company or the town, or to distribute through pipes laid exclusively on private land), to revoke the company's charter, to dispose of any part of the waters of the lake not required for the supply of the inhabitants of Gardner, to control, lease, or sell the use of the lake for fishing, boating, ice cutting, and other purposes not interfering with its use for a water supply in Gardner, to control the operations of the company and its use of the water of the lake to the extent reasonably necessary to protect the purity of the water, and otherwise to exercise over the company the police power of the State within the limits set by the State and Federal Constitutions. . . .

In adopting this basis of valuation we assume that the Legislature contemplated that the town, in purchasing the property, rights and privileges of the company, would act in its private or proprietary capacity as a business corporation, and that the price should be fixed as if the purchase authorized by section 9 was to be made by a private corporation.

We include in the expression "water rights," as used in this ruling, all the rights, privileges and franchises obtained by the company under its charter to sell and distribute the waters of Crystal Lake in the town of Gardner, except the right to lay and maintain pipes, etc., in the public streets, the right to take property by eminent domain, and the other rights considered separately below in 7.

In valuing the company's water sources as defined above, the control and rights of the State in or over the same as therein set forth are to be borne in mind, as also the probability or improbability that these powers will in fact be exercised.

The town objected to that part of the report above quoted upon the ground that "a grant by the State of rights in or to the lake or the waters thereof which entitled the company to a valuation on the basis set forth in the report would deprive the public of that beneficial use to which it is entitled." It should

be noted that one element in the basis of valuation was the right of the State to regulate the rates charged by the company, but not to establish rates so low as to be obnoxious to the provisions of the State and Federal Constitutions. The Supreme Judicial Court held that there was no error in the part of the report of the commissioners that was objected to.

There is no doubt that control of the great ponds in the public interest is in the Legislature that represents the public. It may regulate and change these public rights or take them away altogether to serve some paramount interest. *Sprague v. Minon*, 195 Mass. 581.

Such legislation may be enacted under the sovereign power of the State to control and regulate our public rights. *Sprague v. Minon*, *supra*.

The right of the individual citizen to the use of the great ponds for the purpose of cutting and harvesting ice is a right that exists by virtue of the grant contained in the ancient ordinance above set forth. It is a public grant, and it is the settled law of this Commonwealth that in making any public grant the State may impose such terms as it sees fit, and where no contractual relations are established between the grantee and the Commonwealth it may impose such regulations upon the grant after it is made as it sees fit. It may relieve the grantee from the payment of any damages for the taking of public property or it may require compensation to be made to private persons where no legal right has been interfered with, as in the case where land is taken for railroads and other public works. *Rockport v. Webster*, 174 Mass. 385; *Parker v. Boston & Maine R. R.*, 3 Cush. 107; *Trowbridge v. Brookline*, 44 Mass. 139.

This statement might be further elaborated by reference to familiar instances of the imposition of terms and regulations upon a public grant or franchise.

The enactment of such a regulation does not involve the Commonwealth nor any municipality within it in the business of harvesting and selling ice.

It is my opinion that the enactment of such a law as is

suggested by your inquiry would be simply the regulation of a public right by the imposition of terms upon the grant of the right to take ice from great ponds to be sold to consumers, and that such a statute, if enacted, would not be obnoxious to any provision of the Constitution.

CONSTITUTIONAL LAW — CONTRACTS — BOSTON CONSOLIDATED
GAS COMPANY.

St. 1906, c. 422, does not constitute a contract between the Commonwealth and the Boston Consolidated Gas Company, and the Legislature has authority to alter the provisions regulating the price of gas.

To the House
of Repre-
sentatives.
1914
June 22.

You have requested my opinion upon the following question: —

Whether or not the provisions of chapter 422 of the Acts of the year 1906 constitute a contract between the Commonwealth and the Boston Consolidated Gas Company; and whether the provisions of the said chapter relating to the price of gas may lawfully be changed by the General Court without the assent of said company.

In connection with your request you have submitted a copy of House Bill No. 1674, amending chapter 422 of the Acts of 1906. That part of said chapter that would be affected by the passage of this bill is as follows: —

SECTION 1. From and after the thirtieth day of June in the year nineteen hundred and six, the standard price to be charged by the Boston Consolidated Gas Company for gas supplied to its customers shall be ninety cents per one thousand cubic feet, which price shall not thereafter be increased except as hereinafter provided. From and after the said date the standard rate of dividends to be paid by said company to its stockholders shall be seven per cent per annum on the par value of its capital stock, which rate shall not thereafter be increased except as hereinafter provided.

SECTION 2. If during any year ending on the thirtieth day of June the maximum net price per thousand cubic feet charged by the company has been less than the standard price, the company may during the following year declare and pay dividends exceeding the standard rate in the ratio of one fifth of one per cent. for every one cent of reduction of said maximum net price below the standard price.

Chapter 422 of the Acts of 1906 operated as an amendment of the original charter granted to the Boston Consolidated Gas Company.

The answer to your entire inquiry, therefore, will be settled by the determination of the single question, Did the enactment of chapter 422 of the Acts of 1906 and its acceptance by the Boston Consolidated Gas Company constitute a contract between the Commonwealth and that company?

Beyond any question, if a contract was made the proposed bill, if enacted, would be unconstitutional; and also beyond any question, if a contract was not created between the two parties the rates to be charged by the company may be further regulated by the Legislature, subject only to the provision that they must not be fixed at so low a rate as to be really confiscatory. A contract between the State and a public service corporation is very different from the enactment of a statute regulating the conduct and management of, and fixing maximum rates to be charged to the public by, the corporation.

Your question arises under the Federal Constitution. It has been said that —

The term "contract" is used in the (Federal) Constitution in its ordinary sense, as signifying the agreement of two or more minds, for considerations proceeding from one to the other, to do, or not to do, certain acts. Mutual assent to its terms is of its very essence. (*Louisiana v. Pilsbury*, 105 U. S. 278.)

The charter of a corporation created by the State is a contract and is in all particulars inviolable, unless in the charter itself, or in some general or special law subject to which it was given, there is a power reserved to the Legislature to alter, amend or repeal. *Commonwealth v. New Bedford Bridge*, 2 Gray, 339; *Charles River Bridge v. Warren Bridge*, 7 Pick. 344.

The original charter of the Boston Consolidated Gas Company, St. 1903, c. 417, contains no provision for its alteration, amendment or repeal by the Legislature, nor does chapter 422 of the Acts of 1906, referred to in your inquiry, contain such a provision; but when those acts were passed it was the general

law of the Commonwealth that every act of incorporation should be subject to amendment. Section 3 of chapter 109 of the Revised Laws provides that "every act of incorporation passed since the eleventh day of March in the year eighteen hundred and thirty-one shall be subject to amendment."

This statute, first introduced into the general legislation of the Commonwealth by St. 1830, c. 81, and re-enacted in the Rev. Sts., c. 44, par. 23, and the Gen. Sts., c. 68, par. 41, has been as much a part of all charters since granted as if inserted therein; and was manifestly adopted with the intention of reserving for the future a fuller parliamentary or legislative power than would otherwise be consistent with the effect to be allowed to the special terms of particular charters, under the judicial construction of the constitutional prohibition against impairing the obligation of contracts. The extent of the power reserved by such an enactment has been the subject of some diversity of judicial opinion, and a definition of its extreme limit is not necessary to this case. It is sufficient now to say that it is established by adjudications which we cannot disregard, and the principles of which we fully approve, that it at least reserves to the Legislature the authority to make any alteration or amendment in a charter granted subject to it, that will not defeat or substantially impair the object of the grant, or any rights which have vested under it, and that the Legislature may deem necessary to secure either that object or other public or private rights. (*Commissioners on Inland Fisheries v. Holyoke Water Power Co.*, 104 Mass. 446, 451.)

It is a familiar rule that public grants will be strictly construed against the grantee, and rights conferred by a public grant will not be extended beyond the clear meaning of the language in which they are made. Grants of franchises are usually prepared by those interested in them and submitted to the Legislatures with a view to obtain the most liberal grant obtainable; and for this and other reasons such grants should be in plain language, certain, definite in nature and contain no ambiguity in their terms, and will be strictly construed against the grantee. (*Blair v. Chicago*, 201 U. S. 400.)

Referring to the strictness with which charters granted are to be construed, the courts have laid down the doctrine that the State is to be held to have granted only such powers or immunities as are specifically or unequivocally stated, or as are unavoidably implied therein. Willoughby on the Constitution, Vol. II., p. 898.

The Supreme Court of the United States has said of this class of cases:—

The rule of construction is that it shall be construed most strongly against the corporation. Every reasonable doubt is to be resolved adversely. Nothing is to be conceded but what is given in unmistakable terms or by an implication equally clear. The affirmative must be shown. Silence is negation, and doubt is fatal to the claim. (*Northwestern Fertilizing Co. v. Hyde Park*, 97 U. S. 659.)

Coosaw Mining Co. v. South Carolina, 144 U. S. 550; *Knoxville Water Co. v. Knoxville*, 200 U. S. 22.

It has been further decided that a grant of power to fix its charges, provided they be not in excess of a specified rate in the charter of a corporation, does not prevent the State from afterward fixing lower rates than those established by the corporation. *Georgia Railroad & Banking Co. v. Smith*, 128 U. S. 174. And that generally the reservation by the State of a power to amend or revoke the charter carries with it a power to regulate the charges that may be made. *Peik v. Chicago, etc., Ry. Co.*, 94 U. S. 164.

Applying the rules above stated to the construction of chapter 422 of the Acts of 1906, it is apparent that the Commonwealth did not enter into any agreement that it would not further regulate the rates to be charged by the Boston Consolidated Gas Company. Such a contract is neither clearly expressed in nor fairly to be implied from the language of that chapter. That the State did not make a contract not to regulate further the charges and rates of the Gas Company is conclusively shown by section 9 of chapter 422 of the Acts of 1906, which provides that the rates charged by the company may be either raised or lowered upon certain applications, therein provided for, to the Board of Gas and Electric Light Commissioners.

Without further discussion of this matter I have to say that it is my opinion that the provisions of chapter 422 of the Acts of 1906 did not and do not constitute a contract between the Commonwealth and the Boston Consolidated Gas Company; and that, subject to the rule above stated, the provisions of

that chapter relating to the price of gas may lawfully be changed by the General Court without the assent of that company.

CONSTITUTIONAL LAW — RAILROADS — GUARANTY OF BONDS.

It is within the constitutional authority of the Legislature to provide that the Commonwealth shall guarantee bonds of a railroad company.

To the
Committee on
Bills in the
Third Reading.
1914
June 22.

You have requested my opinion as to the constitutionality of House Bill No. 745, and your inquiry contains the statement that the bill appears to be one which provides that the Commonwealth shall guarantee the bonds of a private enterprise. I assume, therefore, that the source of the doubt arising in your minds as to the constitutionality of the bill is indicated by this statement.

No principle of law is better settled in this Commonwealth than that which forbids the use for a private purpose of money raised by taxation.

But the preamble to this bill states that the purpose of the bill is to secure the building of the railroad described in chapter 556 of the Acts of 1907, as amended and extended by chapter 707 of the Acts of 1912, and to furnish new freight and passenger railroad lines for the State of Massachusetts and the city of Boston, to be operated in the interests of the people of said State and city, and to connect with existing lines at Providence, Fall River and other points. The bill itself, when read in connection with the statutes referred to, bears out the recital of the preamble.

Railroads are held to be built for the public use, whether the right to take land or the right to grant pecuniary aid to them is considered. The Legislature of this Commonwealth has granted aid to railroad corporations from the treasury of the Commonwealth. *Prince v. Crocker*, 166 Mass. 347.

Repeated instances of this are found in our legislation. For example, aid was extended to the Western Railroad Corporation (St. 1836, c. 131), to the Troy & Greenfield Railroad Corpora-

tion (St. 1854, c. 226), to the Williamsburg & North Adams (St. 1867, c. 321), and to the Lee & New Haven (St. 1868, c. 313). The Legislature has also in a number of instances authorized cities and towns to furnish aid to railroad companies by subscribing to stock or otherwise. The constitutionality of such legislation has not been brought into direct controversy before the Supreme Judicial Court, but indirectly has been recognized. *Kittredge v. North Brookfield*, 138 Mass. 286; *Commonwealth v. Williamstown*, 156 Mass. 70. And elsewhere it has been established by such a weight of judicial authority that it must be regarded as settled. *Prince v. Crocker*, 166 Mass. 347, 361. See, also, *Olcott v. Supervisors*, 16 Wall. 678; *Railroad Co. v. Otoe*, 16 Wall. 667; *Pine Grove Township v. Talcott*, 19 Wall. 666; Dillon on Municipal Corporations, 4th ed., §§ 153, 158, 508.

Thus the building of the subway in the city of Boston for the carriage of such passengers as paid the regular fare was held to be for a public use; and it was further held to be within the constitutional power of the Legislature to order or sanction taxation for it. *Prince v. Crocker*, 166 Mass. 347, 361.

It is my opinion that the railroad described in this bill, if built, must, like all other railroads, be regarded as constructed for public use; that the Legislature has the right to extend to it the direct financial aid of the Commonwealth, and that the proposed bill, if enacted, will be constitutional.

STATE FORESTER — SALES OF WOOD AND LUMBER.

Under St. 1908, c. 478, moneys received by the State Forester for the Commonwealth on account of wood and lumber sold by him must be paid to the State Treasurer, and cannot be credited to the Forester's department.

You ask in your letter of June 22 if money turned into the state treasury by the State Forester, which had been received by your department from sales of cordwood and lumber, may be credited by the State Treasurer to the State Forester's appropriation. You suggest that this in part would compensate

To the State
Forester.
1914
June 24.

for the expense of removing this material, which is now borne by the department and met by the annual appropriation.

Chapter 478 of the Acts of 1908 provides for the purchase and acceptance of gifts of land for reforestation. Sections 4 and 5 of that chapter are as follows: —

SECTION 4. Land acquired under the provisions of this act shall be under the control and management of the state forester who may, subject to the approval of the governor and council, cut and sell trees, wood and other produce therefrom.

SECTION 5. All moneys received by or payable to the commonwealth or any one acting on its behalf under the provisions of this act shall be paid into the treasury of the commonwealth.

The language of the statute warrants but one construction, namely, that all money received from sales of trees, wood and other produce must be accounted for and turned over to the State Treasurer. The only way by which these moneys could be credited to your department, and thereby added to your available funds, would be by an extra appropriation.

CONTRACTS — PUBLIC WORKS — LABOR.

The provisions of St. 1914, c. 474, regulating wages of employees on public works, do not apply to contracts made prior to the taking effect of the statute.

You have requested my opinion upon the following question: —

Do the provisions of chapter 474 of the Acts of 1914 apply to contracts made before the fifth day of June, 1914, that being the date upon which that chapter went into effect?

This chapter reads as follows: —

SECTION 1. Section twenty-one of chapter five hundred and fourteen of the acts of the year nineteen hundred and nine is hereby amended by inserting after the word "effect", in the eighth line, the words: — The wages for a day's work paid to mechanics employed in such construction of public works shall be not less than the customary and prevailing rate

To the State
Board of
Labor and
Industries.
1914
June 25.

of wages for a day's work in the same trade or occupation in the locality, city or town where such public works are constructed, — so as to read as follows: — *Section 21.* In the employment of mechanics and laborers in the construction of public works by the commonwealth, or by a county, city or town, or by persons contracting therewith, preference shall be given to citizens of the commonwealth, and, if they cannot be obtained in sufficient numbers, then to citizens of the United States; and every contract for such works shall contain a provision to this effect. The wages for a day's work paid to mechanics employed in such construction of public works shall be not less than the customary and prevailing rate of wages for a day's work in the same trade or occupation in the locality, city or town where such public works are constructed. Any contractor who knowingly and wilfully violates the provisions of this section shall be punished by a fine of not more than one hundred dollars for each offence.

SECTION 2. The board of labor and industries shall enforce the provisions of this act, and in case of any dispute that may arise upon public works as to the customary and prevailing rate of wages the board of labor and industries shall investigate the wages in the trade or occupation in the locality, city or town where such public works are under construction and decide what rate of wages shall be paid upon such works.

This statute relates to the employment of mechanics and laborers in the construction of public works by the Commonwealth, and to the rate of wages to be paid by contractors doing such work.

The contracts of a State with individuals are to be construed in the same manner and have the same binding effect upon the parties thereto as the contracts of private parties. 36 Cyc. 880, par. G.

A State has no more right than an individual to modify or rescind a contract entered into by it unless such right has been reserved. 36 Cyc. 880, par. H.

In *Boston Molasses Co. v. Commonwealth*, 193 Mass. 389, Sheldon, J., says as follows: —

The State, in all its contracts and dealings with individuals, must be adjudged and abide by the rules which govern in determining the rights of private citizens contracting and dealing with each other. There is not one law for the sovereign and another for the subject; but, when the sovereign engages in business and the conduct of business enterprises,

and contracts with individuals, although an action may not lie against the sovereign for a breach of the contract, whenever the contract, in any form, comes before the courts, the rights and obligations of the contracting parties must be adjusted upon the same principles as if both contracting parties were private persons. Both stand upon equality before the law, and the sovereign is merged in the dealer, contractor and suitor.

In an opinion by the Attorney-General, given June 28, 1911, to the Metropolitan Water and Sewerage Board, where a contract was made prior to the act of the Legislature limiting the employment of men to eight hours a day, it was held that the contractor had the right to employ men according to the terms of the contract, and that the terms thereof will not be changed by the passage of the act in question. The statute would be unconstitutional if construed to abrogate or interfere with the terms of this contract.

There is nothing in chapter 474 of the Acts of 1914 indicating any intention that it should apply to contracts made before that chapter would take effect, and such a provision, if made, would undoubtedly constitute a violation of that provision of the Federal Constitution which prohibits any State from enacting a law impairing the obligation of contracts.

It is my opinion that this chapter does not apply to the class of contracts referred to in your inquiry.

CONTRACTS — BIDS — RIGHT OF REJECTION.

Where a public commission, in advertising for bids on a proposed contract, reserves the right to reject any and all bids, no liability attaches in case any of the lowest bids are rejected.

To the State
House Building
Commission.
1914
June 26.

In your communication of recent date, you state in substance that in advertising for bids for contracts for the State House extension you reserved the right to reject any and all bids, and you request my opinion upon the following question: "If the Board shall now reject any of the lowest bidders will such rejected bidders have any recourse at law?"

This question received judicial consideration in the case of *Colorado Paving Co. v. Murphy*, 37 L. R. A. 630. In this case Murphy brought a bill in equity seeking to enjoin the Colorado Paving Company and the mayor and certain other officials of the city of Denver from entering into a contract for the paving of a certain street in Denver. The city authorities had advertised for bids for a contract for this work and had reserved the right to reject any and all bids. Murphy was the lowest bidder and his bid was rejected. The court said:—

“Wherever an action is brought for a breach of duty imposed by statute, the party bringing it must show that he had an interest in the performance of the duty, and that the duty was imposed for his benefit. But where the duty was created or imposed for the benefit of another, and the advantage to be derived to the party prosecuting, by its performance, is merely incidental and no part of the design of the statute, no such right is created as forms the subject of an action.”

It is upon this principle that it is now settled by the great weight of authority that the lowest bidder cannot compel the issue of a writ of mandamus to force the officers of a municipality to enter into a contract with him. (Citing High, Extr. Legal Rem. § 92, and other authorities.) And the courts hold that he cannot maintain an action at law for damages for their refusal to enter into the contract. *Talbot Paving Co. v. Detroit* (Mich.), 3 Det. L. N. 268; *East River Gaslight Co. v. Donnelly*, 93 N. Y. 557. This principle is as fatal to a suit in equity as to an action at law. It goes not to defeat any particular cause of action, but to defeat the right to any relief. Nor is this an unjust or inequitable result. One who offers to contract to do work for a city which he knows has the right to reject his bid ought not to have the power to compel that city to enter into a contract with him simply because it decides to make a contract for the same work with his rival. He knowingly puts the labor and expense of preparing his bid at the hazard of the city's action. It is admitted that, if the city rejects all bids, he has no rights, no equities; and we fail to see how its acceptance of another's bid can give to the unsuccessful bidder any greater right than he would have had if all bids had been rejected. (*Colorado Paving Co. v. Murphy*, 37 L. R. A. 630, 635.)

In a case involving the same principle the Supreme Court of Missouri said:—

In the case in hand the advertisement has the following caption: “Proposals for the erection of the new high school building on Grand avenue.” But the opening lines of the official statement, which follows,

show that the caption refers to the proposals to be received, and is not intended to describe the effect of the advertisement as a whole. If there was otherwise any doubt on this point, it is set at rest by the last sentence, viz., "The board reserves the right to reject any or all bids." That language demonstrates the nature of the advertisement as a mere invitation for offers for a contract. As such it did not lay the foundation of a completed contract. It was merely the opening of negotiations for a contract. . . . No claim is advanced in the petition looking to a recovery for fraud or deceit in making the proposals for bids. It is, indeed, asserted that the defendant rejected the plaintiffs' bid "without cause, arbitrarily and capriciously, through favoritism and bias." But, if the defendant had the absolute right to reject any and all bids, no cause of action would arise to plaintiffs because of the motive which led to the rejection of their bid. The right to reject the bids was unconditional. Defendant was entitled to exercise that right for any cause it might deem satisfactory, or even without any assignable cause. Whatever its rules or practice as to the acceptance of bids may have been, plaintiffs' rights cannot be justly held to be greater than those conferred by the published advertisement on which their bid was made. (*Anderson v. Board of President and Directors of Public Schools*, 26 L. R. A. 707, 712.)

It is my opinion that under the circumstances described in your letter the rejection of any bid would not give the bidder whose offer was rejected any right of action against the Commonwealth nor against the members of your Board, either in their official capacity or as individuals.

CONSTITUTIONAL LAW — RAILROADS — REGULATION OF COMPENSATION OF EMPLOYEES.

It is not within the constitutional powers of the Legislature to compel railroads to give certain employees two days' rest in a month with full compensation.

To the
Governor.
1914
June 29.

In response to your oral inquiry in reference to the bill now before you providing for two days' rest in a month for certain employees with full compensation, I refer you to an opinion rendered March 25, 1914, to the Committee on Railroads on a similar measure, House Bill No. 453.

The leading case in this Commonwealth upon that principle that relates to freedom of contract is *Commonwealth v. Perry*,

155 Mass. 117. A statute had been enacted which provided that no employer should impose a fine upon, or withhold the wages or any part of the wages of, an employee engaged in weaving, for imperfections that may arise during the process of weaving. The court, speaking by Chief Justice Knowlton, say:—

The act recognizes the fact that imperfections may arise in weaving cloth, and it is evident that a common cause of such imperfections may be the negligence or want of skill of the weaver. When an employer has contracted with his employee for the exercise of skill and care in tending looms, it forbids the withholding of any part of the contract price for non-performance of the contract, and seeks to compel the payment of the same price for work which in quality falls far short of the requirements of the contract as for that which is properly done. . . .

. . . It might well be held that, if the Legislature should determine it to be for the best interests of the people that a certain class of employees should not be permitted to subject themselves to an arbitrary imposition of a fine or penalty by their employer, it might pass a law to that effect. But when the attempt is to compel payment under a contract of the price for good work when only inferior work is done, a different question is presented.

There are certain fundamental rights of every citizen which are recognized in the organic law of all our free American States. A statute which violates any of these rights is unconstitutional and void, even though the enactment of it is not expressly forbidden. Article I. of the Declaration of Rights in the Constitution of Massachusetts enumerates among the natural, unalienable rights of men the right "of acquiring, possessing, and protecting property." Article I., § 10, of the Constitution of the United States provides, among other things, that no State shall pass any "law impairing the obligation of contracts." The right to acquire, possess and protect property includes the right to make reasonable contracts, which shall be under the protection of the law.

. . . If the statute is held to permit a manufacturer to hire weavers, and agree to pay them a certain price per yard for weaving cloth with a proper skill and care, it renders the contract of no effect when it requires him, under a penalty, to pay the contract price if the employee does his work negligently and fails to perform his contract. For it is an essential element of such a contract that full payment is to be made only when the contract is performed. If it be held to forbid the making of such contracts, and to permit the hiring of weavers only upon terms that prompt payment shall be made of the price for good work, however badly their work may be done, and that the remedy of the employer for their

derelictions shall be only by suits against them for damages, it is an interference with the right to make reasonable and proper contracts in conducting a legitimate business, which the Constitution guarantees to every one when it declares that he has a "natural, essential, and unalienable" right of "acquiring, possessing, and protecting property." (*Commonwealth v. Perry*, 155 Mass. 117.)

A statute attempting to fix the price and hours of labor as between certain private contractors and their employees could not in my judgment be sustained as a legitimate exercise of the police power contained in the Constitution. It would tend to promote the pecuniary welfare of one class of citizens at the expense of another class. (II. Op. Atty.-Gen. 267.)

The case of *Commonwealth v. Perry* has been cited with approval in our own Commonwealth and by the Supreme Court of Missouri in the case of *State v. Loomis*, 115 Mo. 307, and by the Supreme Court of Illinois in the case of *Braceville Coal Co. v. The People of the State of Illinois*, 147 Ill. 66. In the last-mentioned case it is said:—

The privilege of contracting is both a liberty and a property right, and if A is denied the right to contract and acquire property in the manner which he has hitherto enjoyed under the law, and which B, C and D are still allowed by the law to enjoy, it is clear that he is deprived of both liberty and property to the extent that he is thus denied the right to contract. The man or the class forbidden the acquisition or enjoyment of property in the manner permitted the community at large would be deprived of liberty in particulars of primary importance to his or their pursuit of happiness.

It is evident that if the Legislature may constitutionally enact a law that an employer must pay an employee in every month for two days' labor that is not performed, it may also enact a statute providing that employees must work two days in a month without pay, the unconstitutionality of which would be very readily apparent to every thinking individual. Such an enactment as is proposed interferes both with the personal liberty of the citizen and with the right of freedom of contract. In my opinion such an act would also be obnoxious to that provision of the Fourteenth Amendment of the Constitution of the United States, that "no state shall deprive any person of life, liberty or property without due process of law."

BOSTON, CAPE COD & NEW YORK CANAL COMPANY — DEPOSIT
WITH STATE TREASURER.

Under St. 1899, c. 448, the deposit of \$200,000 with the State Treasurer as security for land damages cannot be applied for any other purpose or taken by virtue of an execution.

You have requested my opinion as to whether the moneys deposited with the Treasurer and Receiver-General of the Commonwealth by the Boston, Cape Cod & New York Canal Company, under the provisions of chapter 448 of the Acts of 1899, are a proper fund out of which to pay an execution issued by the Superior Court in and for the county of Barnstable in favor of Valina T. Bassett, judgment creditor, and against the Boston, Cape Cod & New York Canal Company, judgment debtor.

To the
Treasurer and
Receiver-
General.
1914
June 30.

Sections 23, 24 and 25 of the chapter referred to provide as follows: —

SECTION 23. This act shall be null and void unless said canal company shall, within four months from the passage of this act, and before the filing of the plan of the proposed location as provided in section four, deposit with the treasurer of the commonwealth the sum of two hundred thousand dollars in cash or in United States government bonds, as security for all damages for the taking of land by said company; which money or bonds shall be subject to attachment or levy upon any legal process issued in behalf of any person against said company for the recovery of damages for taking such land. . . .

SECTION 24. All persons whose lands shall be taken by condemnation for the location of said canal as filed by said canal company under the provisions of section four of this act shall, within six months after the filing of such location in the registry of deeds for the county of Barnstable, file with the county commissioners of the county of Barnstable a written statement, setting forth substantially the quantity of land so taken, and the amount of damages so claimed by them, respectively, for the taking thereof, and the county commissioners shall thereupon, after giving to all parties interested such notice as they shall deem sufficient, determine and award the amount of damages to which such persons are entitled.

SECTION 25. Any party dissatisfied with the award of the county commissioners may, at any time within one year after the date of such award, apply by petition to the superior court of the county of Barn-

stable for a jury to assess the damages, and like proceedings shall be had therein as in proceedings for damages for laying out railroads. The treasurer of the commonwealth is hereby empowered and directed, upon the filing with him of a certified copy of the final decree as appears of record in any such proceeding, to pay to the parties appearing by such decree to be entitled thereto, or their legal representatives, the sum of money set forth in said decree.

The funds deposited with the Treasurer and Receiver-General by the canal company are subject to attachment or levy upon legal process for one purpose only; that is, to satisfy claims for land damages. The funds above specified were deposited with the Treasurer and Receiver-General for this single purpose.

By section 24 above quoted all persons whose lands were taken or condemned for the location of the canal were required, within six months after the filing in the registry of deeds for the county of Barnstable of the proper instruments showing the location of the canal, to file with the county commissioners of that county a written statement setting forth substantially the quantity of land taken and the amount of damages claimed by such persons, respectively. Upon the filing of such statement the county commissioners were required to make an award of the amount of damages to which such persons were entitled. After this any party dissatisfied with the award of the commissioners might within one year bring his petition to the Superior Court of Barnstable County to have his damages assessed by a jury; and the Treasurer and Receiver-General is empowered and directed, upon the filing with him of a certified copy of the final decree as appears of record in any such proceeding, to pay to the parties appearing by such decree to be entitled thereto, or to their legal representatives, the sum of money set forth in said decree.

The copy of the execution submitted does not disclose whether the cause of action of the judgment creditor therein named was the taking of land by the defendant company or something else; but the funds in the hands of the Treasurer and Receiver-General can be used only to pay land damages. No certificate accompanies this execution. Before the Treas-

urer and Receiver-General pays any claim against the canal company there should be filed with him a certified copy of the final decree in the proceeding in which payment is claimed. The execution presented is not such a certified copy as the statute requires, and does not show compliance with the various steps required by the statute.

It is my opinion that as the matter now stands the Treasurer and Receiver-General should not pay this execution and that this claim cannot properly be paid out of the fund above mentioned until compliance with the terms of the statute is shown.

CIVIL WAR VETERAN — GRATUITIES — REËNLISTMENT AS SUBSTITUTE.

Under St. 1912, c. 702, as amended by St. 1913, c. 443, a Massachusetts veteran who served as a volunteer in the civil war and was honorably discharged is not debarred from receiving a gratuity from the Commonwealth by reason of subsequent service as a substitute.

You state that you have on file a claim made by a veteran who served as a volunteer in the Civil War from July, 1862, to September, 1863, and that by reason of this service he would be entitled to the gratuity provided by chapter 702 of the Acts of 1912, but that in August, 1864, he reënlisted as a substitute, from which service he was discharged in August, 1867; and you ask my opinion on the following question: "Does the fact of his second service as a substitute debar the veteran from any benefit under this act?"

To the Com-
mission on
Gratuities.
1914
July 1.

The first section of the chapter above referred to contains a very clear and emphatic declaration of the intention and purpose of the Legislature in its enactment. That section reads as follows: —

For the purpose of promoting the spirit of loyalty and patriotism, and in recognition of the sacrifice made both for the commonwealth and for the United States by those veteran soldiers and sailors who volunteered their services in the civil war, and for the purpose of promoting the public welfare, by giving visible evidence to this generation and future

generations that, if danger should again threaten the nation and the call should again come for men, Massachusetts will not forget the great service of those who volunteer, a gratuity of one hundred and twenty-five dollars to each veteran is hereby authorized to be paid from the treasury of the commonwealth under the conditions hereinafter set forth.

Section 2 of said act, as amended by chapter 443 of the Acts of 1913, provides as follows:—

The gratuity herein provided for shall be paid to every person, or his legal representative, not being a conscript or a substitute, and not having received a bounty from the commonwealth or from any city or town therein, who served in the army or navy of the United States to the credit of the commonwealth during the civil war, or who served in the army or navy of the United States during the civil war and was an actual *bona fide* resident of the commonwealth at the time of his enlistment, or who served in a military organization from or raised by the commonwealth, and was honorably discharged from such service, and is living at the time of the passage of this act; it being intended and provided that the said gift shall not be a bounty, nor a payment in equalization of bounties, nor a payment for services rendered, nor a payment for the purpose of making the result of their contracts of enlistment more favorable to them because the contracts of other soldiers were on better terms, but a testimonial for meritorious service such as the commonwealth may rightly give, and such as her sons may honorably accept and receive.

I assume that the applicant was at the time of his enlistment a *bona fide* resident of the Commonwealth; that he was honorably discharged, and that there is no reason why he should not receive the gratuity provided by this act except the fact that after serving his country as a volunteer and after being honorably discharged from the service, not having received a bounty from the Commonwealth or from any city or town therein, he voluntarily reëntered the country's service as a substitute.

The statement of the reasons suggested for rejecting the claim of this applicant indicates quite clearly what the answer to your question ought to be. Here is a man who did not wait for any financial consideration but who offered his services freely to the defence of the Union, whose only fault is, that, having earned

an honorable discharge, he was willing to do still further service for his country, and that on entering the service the second time he took the place of some one who would at best have been an unwilling soldier. To reject this claim for such a reason would, in my opinion, be entirely contrary to the plain provisions of the statute, and in this and all similar cases would defeat its spirit and purpose. The statute bars those whose only service was as conscripts or substitutes, not those who after honorable service as volunteers may have re-enlisted as substitutes.

It is my opinion that the claim referred to in your question and all other like claims should be allowed.

CONSTITUTIONAL LAW — SALEM FIRE — AUTHORITY OF LEGISLATURE TO GRANT RELIEF.

It is within the constitutional authority of the Legislature to grant such relief to sufferers from a public disaster as may be deemed necessary for the protection of the health and safety of the people.

In response to your oral inquiry whether the Legislature has authority under the Constitution to appropriate money to be placed in the hands of a commission and loaned to sufferers by the Salem fire, to aid them in rebuilding their homes and places of business, I have to say that the subject-matter covered by your inquiry was very carefully and fully considered by the Supreme Judicial Court in *Lowell v. Boston*, 111 Mass. 454, a case that grew out of legislation for the relief of sufferers from the great Boston fire of 1872. The act in question, St. 1872, c. 364, provided for the issue by the city of Boston of bonds to an amount not exceeding \$20,000,000, and for the appointment of a commission authorized to loan the proceeds of the bonds so issued, in sums such as they should determine, to the owners of land, the buildings upon which were burned by the fire in Boston on the ninth and tenth days of November, 1872. In a discussion which seems to cover every point raised by your inquiry the court said:—

To the
Governor.
1914
July 3.

It is a question, not of municipal authority, but of *legislative power*. The point of difficulty is not as to the distribution of the burden by allowing it to be imposed upon a limited district within the State, but as to the right of the Legislature to impose or authorize any tax for the object contemplated by this statute.

The power to levy taxes is founded on the right, duty and responsibility to maintain and administer all the governmental functions of the State, and to provide for the public welfare. To justify any exercise of the power requires that the expenditure which it is intended to meet shall be for some public service, or some object which concerns the public welfare. The promotion of the interests of individuals, either in respect of property or business, although it may result incidentally in the advancement of the public welfare, is, in its essential character, a private and not a public object. However certain and great the resulting good to the general public, it does not, by reason of its comparative importance, cease to be incidental. The incidental advantage to the public, or to the State, which results from the promotion of private interests, and the prosperity of private enterprises or business, does not justify their aid by the use of public money raised by taxation, or for which taxation may become necessary. It is the essential character of the direct object of the expenditure which must determine its validity, as justifying a tax, and not the magnitude of the interests to be affected, nor the degree to which the general advantage of the community, and thus the public welfare, may be ultimately benefited by their promotion.

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The ultimate end and object of the expenditure, as indicated by the provisions of the statute itself, is "to insure the speedy rebuilding on said land."

The general result may indeed be thus stated collectively, as a single object of attainment; but the fund raised is intended to be appropriated distributively, by separate loans to numerous individuals, each one of which will be independent of any relation to the others, or to any general purpose, except that of aiding individual enterprise in matters of private business. The property thus created will remain exclusively private property, to be devoted to private uses at the discretion of the owners of the land; with no restriction as to the character of the buildings to be erected, or the uses to which they shall be devoted; and with no obligation to render any service or duty to the Commonwealth, or to the city, — except to repay the loan, — or to the community at large or any part of it. If it be assumed that the private interests of the owners will lead them to re-establish warehouses, shops, manufactories, and stores; and that the trade and business of the place will be enlarged or

revived by means of the facilities thus provided; still, these are considerations of private interest, and, if expressly declared to be the aim and purpose of the act, they would not constitute a public object, in a legal sense.

As a judicial question the case is not changed by the magnitude of the calamity which has created the emergency; nor by the greatness of the emergency, or the extent and importance of the interests to be promoted. These are considerations affecting only the propriety and expediency of the expenditure as a legislative question. If the expenditure is, in its nature, such as will justify taxation under any state of circumstances, it belongs to the Legislature exclusively to determine whether it shall be authorized in the particular case; and however slight the emergency, or limited or unimportant the interests to be promoted thereby, the court has no authority to revise the legislative action.

On the other hand, if its nature is such as not to justify taxation in any and all cases in which the Legislature might see fit to give authority therefor, no stress of circumstances affecting the expediency, importance or general desirableness of the measure, and no concurrence of legislative and municipal action, or preponderance of popular favor in any particular case, will supply the element necessary to bring it within the scope of legislative power.

The expenditure authorized by this statute being for private and not for public objects, in a legal sense, it exceeds the constitutional power of the Legislature; and the city cannot lawfully issue the bonds for the purposes of the act. (*Lowell v. Boston*, 111 Mass. 454, 460, 472.)

This decision has never been overruled or in any degree limited or at all criticized by any later decision of the Supreme Judicial Court. It has been many times cited with approval, and I quote from an *Opinion of the Justices*, 204 Mass. 607, 611, a reference to this case, where after quoting a portion of the opinion above set forth and saying that the statement of the law in the case of *Lowell v. Boston* is clear and accurate it is aid:—

It has governed all later decisions upon kindred questions in this Commonwealth. *Opinion of the Justices*, 155 Mass. 598. *Mead v. Boston*, 139 Mass. 341. It is the law of the Supreme Court of the United States as laid down in an able and exhaustive opinion by Mr. Justice Miller, in *Loan Association v. Topeka*, 20 Wall. 655, in which it was held that a statute authorizing a town to issue its bonds in aid of a manufacturing enterprise was invalid. It has been followed by that court in later cases. *Parkersburg v. Brown*, 106 U. S. 487. *Cole v. LaGrange*,

113 U. S. 1. *Missouri Pacific Railway v. Nebraska*, 164 U. S. 403. It has been applied in different forms in a variety of cases in courts all over the United States. *Opinion of the Justices*, 58 Maine, 590. *Allen v. Jay*, 60 Maine, 124. *Markley v. Mineral City*, 58 Ohio St. 430. *State v. Osawkee Township*, 14 Kans. 418. *Central Branch Union Pacific Railroad v. Smith*, 23 Kans. 745. *Coates v. Campbell*, 37 Minn. 498. *Deering & Co. v. Peterson*, 75 Minn. 118. *Minnesota Sugar Co. v. Iverson*, 91 Minn. 30. *Eufaula v. McNab*, 67 Ala. 588. *Manning v. Devil's Lake*, 13 No. Dak. 47. *Michigan Sugar Co. v. Auditor General*, 124 Mich. 674. *Deal v. Mississippi County*, 107 Mo. 464. *Feldman & Co. v. City Council of Charleston*, 23 S. C. 57. *Sutherland-Innes Co. v. Evart*, 30 C. C. A. 305.

Without further discussion of this question I may say that the decisions of our Supreme Judicial Court above quoted unquestionably express the law covering your inquiry as it stands to-day, and are conclusive as to the power of the Legislature to authorize the loan of any part of the public funds of the Commonwealth for individual or private use, and preclude the possibility of such action. These considerations, however, relate to the matter of rebuilding the city.

But other and more important considerations arise as to the condition of things now existing at Salem. A great calamity has befallen, one which, while it affects more keenly the residents of the stricken city and those who without warning have been thrown out of employment and stripped of their worldly possessions, is still a disaster in which every citizen of the Commonwealth shares. Such a condition as now exists in Salem presents a public emergency, one that justifies and demands the exercise of the constitutional power of the government in making proper provision for the health and safety of the people.

When a great public disaster has occurred leaving thousands of people without food, shelter or employment, it is unthinkable that the hands of the government of the Commonwealth are so tied as to render it utterly supine and powerless to furnish aid, and that the sufferers must of necessity be left to the hap-hazard of private charity. The local authorities are necessarily practically powerless in the presence of such great destruction and suffering. The condition of things so suddenly precipitated,

the claims of humanity, and the good of the Commonwealth call for immediate and extraordinary relief. It is my opinion that the Legislature has power under the Constitution to appropriate money from the funds of the Commonwealth to be used under such direction and supervision as it may deem proper for providing proper food, clothing and shelter for the sufferers from the Salem fire during such period of time as may be deemed necessary, as a measure for the protection of the health and safety of the people, and for the promotion of the general welfare.

LABOR — EIGHT-HOUR DAY — POLICE DRIVERS.

Civilians employed as hostlers or drivers in the Boston police department are within the provisions of St. 1911, c. 494, § 1, restricting employment of certain persons to eight hours in a calendar day, but police officers detailed to perform the work of drivers or hostlers are not so restricted.

You have requested my opinion upon the following questions: —

To the State
Board of
Labor and
Industries.
1914
July 8.

First, are civilians employed as hostlers or drivers for the police department of the city of Boston within the provisions of chapter 494 of the Acts of 1911?

Second, are police officers who are detailed to perform the work of drivers and hostlers of the police department of the city of Boston entitled to the benefit of the eight-hour law?

Section 1 of chapter 494 of the Acts of 1911 provides as follows: —

The service of all laborers, workmen and mechanics, now or hereafter employed by the commonwealth or by any county therein or by any city or town which has accepted the provisions of section twenty of chapter one hundred and six of the Revised Laws, or of section forty-two of chapter five hundred and fourteen of the acts of the year nineteen hundred and nine, or by any contractor or sub-contractor for or upon any public works of the commonwealth or of any county therein or of any such city or town, is hereby restricted to eight hours in any one calendar day, and it shall be unlawful for any officer of the commonwealth or of any county therein, or of any such city or town, or for any such contractor or sub-contractor or other person whose duty it shall be

to employ, direct or control the service of such laborers, workmen or mechanics to require or permit any such laborer, workman or mechanic to work more than eight hours in any one calendar day, except in cases of extraordinary emergency. Danger to property, life, public safety or public health only shall be considered cases of extraordinary emergency within the meaning of this section. In cases where a Saturday half holiday is given the hours of labor upon the other working days of the week may be increased sufficiently to make a total of forty-eight hours for the week's work. Threat of loss of employment or to obstruct or prevent the obtaining of employment or to refrain from employing in the future, shall each be considered to be "requiring" within the meaning of this section. Engineers shall be regarded as mechanics within the meaning of this act.

Your letter does not state, and I am not informed, whether the city of Boston has accepted the provisions of the eight-hour law, but for the purposes of this opinion I assume that it has done so.

In answer to the first question I have to say that it is my opinion that civilians employed as hostlers or drivers for the police department of the city of Boston are within the provisions of section 1 of chapter 494 of the Acts of 1911.

In answer to your second question I have to say that it is my opinion that regular officers of the police department detailed to perform the duties of hostlers and drivers are not within the provisions of the eight-hour law. They have a civil service rating as patrolmen, and draw salaries as police officers, and not as hostlers or drivers.

CLERKS OF COURTS — ASSISTANT CLERKS — CLERKS PRO
TEMPORE.

Unless an assistant clerk of court is appointed clerk *pro tempore* in the absence of the clerk, he is not entitled to any increase in his regular salary.

You have requested my opinion upon the following question: —

When an assistant clerk of a police, district or municipal court is appointed clerk *pro tempore* is he entitled to the salary of the clerk while holding such position?

R. L., c. 160, §§ 11, 12 and 70, provide:—

SECTION 11. The clerk of a police, district or municipal court may, subject to the approval of the justice, from time to time appoint one or more assistant clerks, who shall be removable at his pleasure or at the pleasure of the court, for whose official acts the clerk shall be responsible and who shall be paid by him unless they receive salaries which may be allowed and fixed by law.

SECTION 12. In case of the absence, death or removal of a clerk of a police, district or municipal court, the court may appoint a clerk *pro tempore*, who shall act until the clerk resumes his duties or until the vacancy is filled.

SECTION 70. Clerks *pro tempore* of police, district and municipal courts shall receive from the county as compensation for each day's service an amount equal to the rate by the day of the salary of the clerk; but compensation so paid to a clerk *pro tempore* for service, in excess of thirty days in any one calendar year, shall be deducted by the county treasurer from the salary of the clerk.

St. 1906, c. 256, provides:—

SECTION 1. In case of the absence, death or removal of an assistant clerk of a police, municipal or district court, other than the municipal court of the city of Boston, whose office is established by law, the clerk, subject to the approval of the justice, may appoint an assistant clerk *pro tempore*, who shall act until the assistant clerk resumes his duties or until the vacancy is filled, and who shall receive from the county as compensation for each day's service an amount equal to the rate by day of the salary of the assistant clerk; but compensation so paid to an assistant clerk *pro tempore* for service, in excess of twenty days in any one calendar year, shall be deducted by the county treasurer from the salary of the assistant clerk.

There is nothing in the law which prohibits the appointment of an assistant clerk of a court to the office of clerk *pro tempore*, but it is my opinion that the two positions are incompatible and cannot be held by a person at one and the same time. When an assistant clerk accepts an appointment as clerk *pro tempore*, he vacates the position of assistant clerk and is entitled to receive from the county as compensation for each day's service an amount equal to the rate by the day of the salary of the clerk. Upon the expiration of his term as clerk *pro tempore* he is, of course, again eligible to appointment as assistant clerk.

REGISTERS OF DEEDS — SALARIES.

Salaries of registers of deeds are to be readjusted each year in accordance with the classifications provided in St. 1904, c. 452.

To the
Controller of
County
Accounts.
1914
July 24.

You ask my opinion as to the proper method of determining the salary of the register of deeds of Franklin County, in view of the fact that the receipts of said registry in 1913 exceeded \$3,000.

Chapter 452 of the Acts of 1904 established the salaries of registers and assistant registers throughout the Commonwealth. Certain classifications were made: Class A, where the yearly receipts for the five years preceding the year 1903 amounted to \$3,000 or more, and where the register was given an initial salary of \$1,600 plus a sum equal to 15 per cent. of said receipts; Class B, where the receipts were between \$1,500 and \$3,000, with an initial salary of \$900 plus 40 per cent.; Class C, where the receipts were less than \$1,500 per year, with a salary equal to the receipts and not less than \$600. Several registries were mentioned by name and the salaries stated.

Section 2 of that chapter reads as follows: —

The salaries of registers of deeds and assistant registers of deeds heretofore specified shall be readjusted in January, nineteen hundred and six, and every five years thereafter, upon the basis of the average yearly receipts of the respective registries for the five preceding years, in accordance with the classification set forth in section one.

This was amended by chapter 682 of the Acts of 1913, as follows: —

The salaries of registers of deeds and assistant registers of deeds heretofore specified shall be readjusted in January, nineteen hundred and fourteen, and in the month of January of each year thereafter, upon the basis of the receipts of the respective registries for the year preceding, every such readjustment to be in accordance with the classification set forth in section one.

The plain purport of the recent enactment was to readjust the salaries each year, the readjustment to be in accordance

with the classification set forth in the prior act, and by classification is meant that all registries whose receipts are more than \$3,000 in the year shall be in Class A; those whose receipts are between \$1,500 and \$3,000 shall be in Class B, etc. It was not intended that a registry named as a Class B registry in the 1904 act should remain so if it had attained the rank of a Class A registry.

As the Franklin County Registry is now in Class A, the salary of the register must be determined by the Class A rate, namely, \$1,600 plus 15 per cent. of the receipts.

SAVINGS BANKS — BOARDS OF INVESTMENT — MORTGAGES.

The position held by a member of a board of investment of a savings bank becomes vacant in sixty days after such member holds, either personally or as trustee, property mortgaged to said bank.

In a recent communication you state that you have received a letter from one of the savings banks in the Commonwealth which reads as follows:—

To the
Bank Com-
missioner.
1914
July 27.

For several years we have had a mortgage on a piece of property which has now been sold to an association known as The Twenty-five Associates. One of the trustees of The Twenty-five Associates, in whom the title of the property is vested and by whom the papers assuming the mortgage are signed, is a member of our board of investment. Would there be any objection to our continuing this mortgage under the circumstances?

You ask for an opinion upon the question raised by the bank, and further inquire whether if this loan is taken by the bank it would be a violation of section 44 of chapter 590 of the Acts of 1908.

The bank does not state whether the mortgage in question is now due or still has some time to run. If the mortgage is not due it cannot be foreclosed until maturity. It might be assigned; but if held by the bank the position of the member of the board of investment who has become a trustee of The

Twenty-five Associates will become vacant in sixty days from the time when he became such trustee, under the provisions of the section above referred to. With this member off the board of investment, only the usual business question will be present, either as to holding the mortgage or renewing it. If, however, the mortgage has matured and the question under consideration is really as to its renewal, I am of the opinion that this cannot be done legally while any member of the board of investment holds title to the mortgaged property, whether in his own right or as a trustee, and that this is so whether he holds as a sole trustee or as a member of a body of trustees. The making of a loan by a savings bank to a trustee or to a body of trustees, one of whom is a member of the board of investment of the bank, would, in my opinion, constitute a violation of the provisions of section 44 of chapter 590 of the Acts of 1908.

STATE BOARD OF HEALTH — CIVIL SERVICE.

The powers and duties of the State Board of Health are retained until the Department of Health is organized.

The secretary of the State Board of Health ceases to hold office upon the abolition of the Board.

Employees of the State Board of Health holding offices not created by statute hold office until removed or until their successors are appointed.

You have requested my opinion upon the following questions: —

First. — Will its previously existing powers and duties reside in the State Board of Health until the new Department of Health is organized?

Second. — Will the secretary of the State Board of Health continue to hold office until the organization of the new Health Department?

Third. — In case the office of secretary to the State Board of Health ceases to exist on Aug. 6, 1914, would the official known as "assistant to the secretary" (not under Civil Service Rules) share in the status of the secretary or would he continue to hold office as an employee "under section 7 of chapter 792, Acts of 1914"?

The State Board of Health was appointed and holds office under the provisions of section 1 of chapter 75 of the Revised

Laws. This section is expressly repealed by section 8 of chapter 792 of the Acts of 1914.

This act contains no provision as to the time when it shall take effect, and your first question is really whether section 8 takes effect on the passage of the bill or falls within the provisions of section 1 of chapter 8 of the Revised Laws, which reads as follows:—

A statute shall take effect throughout the commonwealth, unless otherwise expressly provided therein, on the thirtieth day next after the day on which it is approved by the governor, or is otherwise passed and approved, or has the force of a law, conformably to the constitution.

The rule established by the section last quoted is a statutory one, and may be repealed or altered by statute, and it may be argued that in case of a repealing statute the later enactment takes effect immediately and repeals by implication the provisions of section 1 of chapter 8 of the Revised Laws, above quoted, in so far as the particular later enactment is concerned; but it should be noted that repeals by implication are not favored.

It is presumed that the Legislature does not intend to make unnecessary changes in the pre-existing body of law. The construction of a statute will, therefore, be such as to avoid any change in the prior laws beyond what is necessary to effect the specific purpose of the act in question. *Manuel v. Manuel*, 3 Ohio St. 450; *Sykes v. St. Louis & S. F. R.R. Co.*, 127 Mo. App. 326; *State v. Hooker*, 22 Okla. 712.

It is in the last degree improbable that the Legislature could depart from the general system of law without expressing its intention with irresistible clearness. Maxwell on Interpretation of Statutes, 2d ed. 96.

It is my opinion, therefore, that the repeal of sections 1, 2 and of chapter 75 of the Revised Laws does not take effect until the thirtieth day next after the day on which chapter 792 of the Acts of 1914 was approved.

It is also my opinion that when the new law goes into effect, and the statute under which the State Board of Health now

exists is abolished, the official powers and duties of the Board come to an end and expire with the statute under which it was appointed.

In response to your second question I have to say that the secretary of the Board holds his office by virtue of the provisions of section 3 of chapter 75 of the Revised Laws. This section provides for the election of a secretary "who will be the executive officer and shall hold office during the pleasure of the board." This section is repealed by section 8 of chapter 792 of the Acts of 1914, and while this chapter provides for the retention of the employees of the State Board of Health it makes no provision for the retention of any member of the Board nor of its officers. The secretary being the executive officer of the Board, it is my opinion that when chapter 792 of the Acts of 1914 takes effect, and the State Board of Health ceases to exist, he will cease to hold office.

Referring to your third inquiry, which relates to the position of assistant secretary of your Board, it appears that this is not an office created by sections 1, 2 and 3, or either or any of them, and that the assistant secretary is an employee of your Board and is within the provisions contained in section 7 of chapter 792 of the Acts of 1914, that all present employees shall be continued in office until their successors are appointed and qualified or until removed by the commissioner.

LABOR — PUBLIC WORKS — CITIZENS.

Under St. 1914, c. 600, where a city has a list of United States citizens eligible for employment in the street department, it is the duty of the city to discharge noncitizen employees, although their employment commenced prior to the enactment of the statute.

To the
Civil Service
Commission.
1914
August 3.

You state that citizens of Newton complain that there are employed in the street department of that city a number of persons who are not citizens of the United States and insist that under the provisions of section 4 of chapter 600 of the Acts of 1914 the commission take steps to enforce the dismissal of these

noncitizens. You further state that it appears upon investigation that in most of the cases the noncitizen employees referred to were appointed long prior to the enactment of chapter 600 of the Acts of 1914, and you ask my opinion as to whether your commission should insist upon the discharge of these non-citizens who were appointed prior to the passage of this act.

The statute referred to provides as follows:—

SECTION 1. In all work of any branch of the service of the commonwealth, or of any city or town therein, citizens of the commonwealth shall be given preference.

SECTION 2. The civil service commission shall not place upon its lists any person not a citizen of the United States.

SECTION 3. If an appointing officer, because of the non-existence of a list of eligible appointees, appoints under provisional authority from the civil service commission a person not a citizen of the United States, he shall discharge the person so appointed and appoint from the eligible list whenever the civil service commission establishes a list of the proper class.

SECTION 4. Whenever the attention of the civil service commission shall be called by complaint on the part of any citizen of the commonwealth to the employment of a non-citizen when there is a list of eligibles existing, the commission shall take steps to enforce the dismissal of such non-citizens and the appointment in his place from the suitable eligible list.

SECTION 5. Whenever it shall appear that any appointing officer has had due notice of unlawful employment of a non-citizen and that the said appointing officer has continued such employment for ten days after such notice, he shall be subject to a fine of not less than ten nor more than one hundred dollars for each offence.

SECTION 6. This act shall take effect upon its passage.

This statute seems to have been enacted with a double purpose. Sections 1, 2 and 3 relate to appointments; sections 4 and 5, to employment. I assume that the employees to whom you refer are laborers. The act is not, in my opinion, retrospective so as to affect the legality of appointments made prior to its enactment, but section 4 relates to continuous employment after its passage. For a man to be registered on the civil service list by a city and designated or appointed as a laborer is one thing; continuous employment is quite another. This

section does not relate to things past, but provides that whenever after its enactment the attention of the Civil Service Commission shall be called by complaint on the part of any citizen of the Commonwealth to the employment of a non-citizen when there is a list of eligibles existing, action shall be taken to enforce the dismissal of such noncitizen.

It is my opinion that in the case stated, if the city of Newton has a list of eligibles made up of citizens as required by the provisions of this act, it is the duty of your Board to insist upon the discharge of the noncitizens whose employment is complained of.

COUNTY COMMISSIONERS — EXPENSES — CONTROLLER OF
COUNTY ACCOUNTS.

County commissioners may be allowed as reimbursement for expenses, under St. 1911, c. 162, only such sums as are expended in the performance of official duty, whether within or without the Commonwealth, if such expenses are reasonable and proper in amount.

To the
Controller of
County
Accounts.
1914
August 4.

You have requested my opinion upon the following question: —

May expenses of county commissioners incurred outside the limits of the Commonwealth be allowed by the controller of county accounts?

The statute governing this matter (section 1 of chapter 162 of the Acts of 1911) provides as follows: —

An itemized statement of the actual and proper cost to the commissioners for transportation and other necessary expenses incurred in the performance of their official duties shall on the first day of each month be certified by them to the controller of county accounts who shall audit and if correct certify the same to the county treasurer who shall reimburse the commissioners for such expenses from the county treasury.

The question does not appear to be as to the place where the expense is incurred, but whether the item charged represents the proper cost or expense to the commissioners of transportation or other necessary expenses incurred in the performance of their official duties. The test is not whether the duty is to be

discharged or performed within this Commonwealth or outside of it, but whether the expense charged was incurred in the performance of official duty and whether it is reasonable and proper in amount.

You enclose correspondence containing an inquiry whether the expenses of county commissioners in attending the Congress of the American Prison Association should be allowed. Admitting that the commissioners by attending the congress would gain much useful and important information, it is still my opinion that attending the Congress of the American Prison Association could not be regarded as official business, and therefore that expenses incurred in attending that or other similar gatherings cannot properly be allowed except in cases where a special appropriation has been made. The rule which you state you have hitherto followed seems to me to be correct.

LABOR — MATERIALS AND SUPPLIES — EIGHT-HOUR DAY.

Wood finish, doors, casings, etc., purchased in the open market under a contract to which the Commonwealth is a party, and which enter into the construction of a building, are materials and supplies, and St. 1911, c. 494, § 2, providing an eight-hour day for employees on State work, does not apply.

You have requested my opinion on the following question: —

To the State
Board of
Labor and
Industries.
1914
August 12.

Are wood finish, doors, casings and other wood-trim material or supplies within the meaning of the provisions of section 2 of chapter 494 of the Acts of 1911?

That section reads as follows: —

Every contract, excluding contracts for the purchase of material or supplies, to which the commonwealth or any county therein or any city or town which has accepted the provisions of section twenty of chapter one hundred and six of the Revised Laws, is a party which may involve the employment of laborers, workmen or mechanics shall contain a stipulation that no laborer, workman or mechanic working within this commonwealth, in the employ of the contractor, sub-contractor or other person doing or contracting to do the whole or a part of the work con-

templated by the contractor shall be requested or required to work more than eight hours in any one calendar day, and every such contract which does not contain this stipulation shall be null and void.

Your question possibly arises from the fact that you consider wood trim, wood finish, doors and casings as a finished product. They may be so, but it is true that many other kinds of material going into the construction of a building, and properly falling under the head of material or supplies, are also finished products. Such things as nails, putty, paint and many other kinds of articles represent somebody's finished product. They are, however, part of the necessary material of the building. If wood finish, doors, casings and other wood trim are purchased of a manufacturer in the open market under a contract to which the Commonwealth or any town or city which has adopted the provisions of the eight-hour law is a party, they are, in my opinion, to be regarded as material or supplies within the meaning of the statute above referred to.

BOARD OF EDUCATION — FRAMINGHAM NORMAL SCHOOL —
LAUNDRY.

A resolve providing for the erection and furnishing of a dormitory in a normal school does not authorize the equipment of a laundry.

To the
State Board
of Education.
1914
August 12.

You have submitted a copy of chapter 141 of the Resolves of 1914, and ask "if there is anything in this act which would prevent this Board from equipping a laundry in connection with this building."

The resolve referred to reads as follows: —

Resolved, That there be allowed and paid out of the treasury of the commonwealth a sum not exceeding one hundred and forty-five thousand dollars, to be expended at the state normal school at Framingham, under the direction of the board of education, for erecting and furnishing a new dormitory, for additional sewer beds and drains, for repairs to the heating plant and the installation of new boilers, and for engineers' and architects' fees.

The appropriation is made for the specific purposes named in the act: (1) to erect and furnish a new dormitory; (2) for additional sewer beds and drains; (3) for repairs to the heating plant and the installation of new boilers, and (4) for engineers' and architects' fees.

The question seems to be whether the word "dormitory" may properly include equipping a laundry. The word "dormitory" is defined as —

A place, building, or room to sleep in. . . . That part of a boarding-school or other institution where the inmates sleep, usually a large room, either open or divided by low partitions, or a series of rooms opening upon a common hall or corridor: in American colleges, sometimes an entire building divided into sleeping-rooms. (Century Dictionary.)

The word "dormitory" has been held not to include a dining hall. *Hillsdale College v. Rideout*, 82 Mich. 94. By the same reasoning it would not include a laundry.

It is not what is contained in but what is omitted from this act that creates your difficulty. Your Board may lawfully exercise in this matter only such authority as is conferred upon it by the Legislature, and this act does not, in my opinion, confer authority to equip a laundry.

DISTRICT POLICE — BUILDING INSPECTORS — REVOCATION OF CERTIFICATES.

Certificates of the proper equipment of buildings, issued under St. 1913, c. 655, § 25, may be revoked by the inspector for the district where the buildings are located, whether such inspector issued the original certificate or not.

You have requested my opinion upon the following question: —

May an inspector of the building inspection department of the District Police revoke a certificate issued by his predecessor in office, under the provisions of section 25 of chapter 655 of the Acts of 1913, to the owner, lessee or occupant of a building in the district of said inspector?

To the
Chief of the
Massachusetts
District Police,
1914
August 17.

The section of the statute above referred to provides as follows: —

SECTION 25. Except as is otherwise provided by law, the inspectors shall from time to time examine all buildings within their respective districts which are subject to the provisions of this act. If, in the judgment of any such inspector, such building conforms to the requirements of this act for buildings of its class, he shall issue to the owner, lessee or occupant thereof, or of any portion thereof used in the manner described in section twenty of this act, a certificate to that effect, specifying the number of persons for whom the egresses and means of escape from fire are sufficient. Such certificate shall continue in force for not more than five years after its date, but so long as it continues in force it shall be conclusive evidence of a compliance by the person to whom it is issued with the provisions of this act. It shall be void if a greater number of persons than is therein specified are accommodated or employed or assemble, lodge or reside within such building or portion thereof, or if such building is used for any purposes materially different from the purpose or purposes for which it was used at the time of the granting thereof, or if its interior arrangement is materially altered, or if any egresses or means of escape from fire in such building at the time of granting the said certificate are rendered unavailable or are materially changed. The certificate may be revoked by such inspector at any time upon written notice to the holder thereof or to the occupant of the premises for which it was granted, and shall so be revoked if, in the opinion of the inspector, circumstances have so changed that the existing egresses and means of escape are not proper and sufficient. A copy of said certificate shall be kept posted in a conspicuous place upon each story of such building by the occupant of the premises covered thereby.

The certificate provided for by this section, so long as it remains in force, is conclusive evidence of a compliance with the statute by the owner, lessee or occupant of the building for which it was issued, but it may be revoked by the inspector at any time upon written notice to the holder or to the occupant of the premises for which it was granted. No question can arise as to the power of the inspector issuing the certificate to revoke it, but your question refers to a situation that arises when an inspector who has issued such a certificate dies or leaves the service or is transferred to another district.

The Legislature in enacting this statute did not, in my opinion, intend that it should be necessary that the same individual who issued the certificate should be the only one who could possibly revoke it. It is my opinion, therefore

that while such a certificate may not be revoked by an inspector other than the one who issued it, who may, by chance or upon some sudden exigency, be in the district, it may be revoked at any time upon notice in writing by the inspector for the district in which the building is located without regard to the personality or individuality of the inspector. In other words, the fact that the inspector who issued the license is not the same person who revokes it is not material so long as it was issued by the inspector for the district in which the building is situated and is revoked by the inspector for the same district. As this answers your first question in the affirmative, consideration of your second question becomes unnecessary.

DIRECTORS OF THE PORT OF BOSTON — TIME DEVOTED TO WORK.

Under St. 1914, c. 712, each member of the Directors of the Port of Boston is required to devote the regular working hours of every working day to the work of the Board.

You have requested my opinion as to the proper construction to be placed upon that part of chapter 712 of the Acts of 1914, entitled "An Act relative to the Directors of the Port of Boston," which relates to the time to be devoted to the work of the Directors of the Port by the respective members of the Board. Section 1 of the chapter referred to provides as follows: —

To the
Directors of
the Port of
Boston.
1914
August 19.

The governor, with the advice and consent of the council, shall appoint three persons who shall constitute a board to be known as the Directors of the Port of Boston, hereinafter called the directors. The terms of office of the persons first appointed by the governor shall be so arranged and designated at the time of their appointment that the term of one member shall expire in three years, one in two years and one in one year from the first day of July, nineteen hundred and fourteen. Annually hereafter the governor shall appoint one member to serve for three years, as the term of any member expires. Any vacancy occurring among the directors shall be filled for the unexpired term by the governor. The governor shall designate one member as chairman and another as secre-

tary, whose duties shall be those customarily performed by chairmen and executive secretaries. Each member shall devote his entire time to the work of the directors. Each member shall receive an annual salary of six thousand dollars.

Your inquiry relates solely to the following sentence: "Each member shall devote his entire time to the work of the directors."

It is provided by law that "in construing statutes . . . words and phrases shall be construed according to the common and approved usage of the language." R. L., c. 8, § 4.

Applying this rule of construction it hardly need be said that the phrase "entire time" as used in the statute refers to the usual and regular time for work, and has no relation to any time other than the regular hours of labor; and the construction of this statute depends upon the common and approved usage of the word "entire." It has been said that "the best lexicographers define 'entire' to be the whole, undivided, not participated in with others." *Heathman v. Hall*, 3 Iredell, 414.

This word is more fully defined as "whole; unbroken; undiminished; perfect; not mutilated; . . . full; complete; undivided; wholly unshared, undisputed, or unmixed." (Century Dictionary.)

Applying the statutory rule of construction above stated to the statute in question, it is my opinion that the provisions of chapter 712 of the Acts of 1914 require that each member of the Directors of the Port of Boston shall devote the regular working hours of every working day to the work of the Board.

LIQUOR LAW — COMMON-LAW RIGHT TO ENTER A NOLLE PROSEQUI.

The common-law authority of district attorneys to enter a *nolle prosequi* in prosecutions for violation of liquor laws is prohibited by R. L., c. 100, § 55.

You have requested my opinion upon the following question:—

To the
District
Attorney for
the Northern
District.
1914
August 26.

Does R. L., c. 100, § 55, regulating the disposition of prosecutions for violation of law relative to intoxicating liquors, constitute a prohibition of the common-law authority of the district attorney to enter a *nolle prosequi* in such cases?

The Constitution of Massachusetts, Chapter VI., Article VI., provides that —

All the laws which have heretofore been adopted, used, and approved in the Province, Colony, or State of Massachusetts Bay, and usually practised on in the courts of law, shall still remain and be in full force, until altered or repealed by the legislature; such parts only excepted as are repugnant to the rights and liberties contained in this constitution.

This provision served in the first place to preserve in the Commonwealth a body of law and a system of legal procedure during the time that must necessarily elapse between the adoption of the Constitution and the enactment and adoption of such other body of laws and methods of procedure as the Legislature might determine.

It is perfectly clear that the common law and the laws adopted by the province, colony or state of Massachusetts Bay are subject to revision and repeal at the will of the Legislature. At the common law a district attorney might enter a *nolle prosequi* in cases of violation of the laws in regard to intoxicating liquors. And here the statute comes in with the provision that —

A prosecution for the violation of any provision of law relative to intoxicating liquors shall not, unless the purposes of justice require such disposition, be placed on file or disposed of except by trial and judgment according to the regular course of criminal proceedings. It shall be otherwise disposed of only upon motion in writing stating specifically the reasons therefor and verified by affidavit if facts are relied on. If the

court or magistrate certifies in writing that he is satisfied that the cause relied on exists and that the interests of public justice require the allowance thereof, such motion shall be allowed and said certificate shall be filed in the case. (R. L., c. 100, § 55.)

A statute is the written expression of the legislative will. It is the positive declaration of what the law shall be by that branch of the government possessing legislative functions, . . . When duly enacted it becomes controlling in respect to the matter to which it properly relates, and unless transcribing certain fixed constitutional limitations, its effect is absolute until again changed by like legislative authority. (36 Cyc. 941.)

A statute is impliedly repealed by a subsequent one revising the whole subject-matter of the first; *Bartlett v. King*, 12 Mass. 545; *Nichols v. Squire*, 5 Pick. 168; and in the case of a statute revising the common law, the implication is at least equally strong. (*Commonwealth v. Cooley*, 10 Pick. 37.)

Section 55 of chapter 100 of the Revised Laws was evidently intended to revise and change the statute and the common law in regard to prosecutions for violation of law relative to intoxicating liquors. It is true that a *nolle prosequi* is not specifically mentioned in this section. But entering a *nolle prosequi* is one way of disposing of a prosecution of this kind, and the statute provides that such a prosecution shall not, unless the purposes of justice require such disposition, be placed on file or disposed of except by trial and judgment according to the regular course of criminal proceedings. And if justice requires that such a prosecution be placed on file or otherwise disposed of without trial, this section contains elaborate provisions for bringing the fact to the attention of the court and for such action as the court may deem proper.

It is my opinion that section 55 of chapter 100 of the Revised Laws does prohibit the exercise of the common-law authority of the district attorney to enter a *nolle prosequi* in prosecutions for violation of any provision of law relative to intoxicating liquors.

HIGHWAY COMMISSION — CONTRACT.

Under a statute authorizing the construction of a street and providing for a "road-way above the finished subgrade of wood block pavement upon a cement base, or some other suitable material," the last clause refers to the base and does not warrant the use of pavement other than wood block.

The Highway Commission, in the absence of statutory direction, has authority to exercise its discretion as to the materials to be used in any work.

You have requested my opinion upon the following questions: —

To the
Massachusetts
Highway
Commission.
1914
August 31.

(1) Has this Commission authority, under the provisions of section 5 of chapter 778 of the Acts of 1913 relating to the construction of Humphrey Street in the Town of Swampscott, to change, by agreement with the contractor, the contract and specification heretofore made for paving said street with wood block upon a cement base so that said street may be paved with some material other than wood block? (2) Has this Commission in constructing certain approaches to Humphrey Street authority to use any material other than wood block for paving?

Chapter 778 of the Acts of 1913 is entitled "An Act relative to the laying out and construction of Humphrey Street in the town of Swampscott." This chapter contains full and elaborate provisions for the preparation of plans and specifications for the laying out and construction of Humphrey Street in the town of Swampscott, for the approval of such plans and specifications by county commissioners for the county of Essex and the selectmen of the town of Swampscott, for the laying out of said street, the acquisition of such lands as may be necessary in order to carry this act into effect, for the payment of damages and for other things incident to and attendant upon the laying out and construction of a public way that is expected and intended to be a thoroughfare.

Your questions seem to be founded upon or to arise in regard to the provisions of section 5 of this chapter, which are as follows: —

Upon the completion of the layout of said Humphrey street as aforesaid, the Massachusetts highway commission shall construct said street to the finished subgrade line, and shall construct sidewalks with curbs, the necessary retaining walls, and all necessary means of drainage, in-

cluding any changes which may be necessary in the present underground structures and connections, and shall build a roadway above the finished subgrade of wood block pavement upon a cement base, or some other suitable material, from a line eighteen inches outside the car tracks to the sidewalk curb on each side, in accordance with said plans and specifications.

Does the expression "and shall build a roadway above the finished subgrade of wood block pavement upon a cement base, or some other suitable material" as used in section 5 limit your board to the use of wood block as the only paving material it may lawfully use in the construction of this street?

In construing a statute the effort always is to ascertain and carry out the intention of the Legislature. It is ever to be borne in mind, however, that the intention of the law-making power is to be ascertained by a careful examination and a reasonable construction of the language of the statute and not by a construction founded upon mere arbitrary rule or conjecture.

In one case it was said by a judge of great learning that —

Our decision may perhaps in this particular case operate to defeat the object of the statute but it is better to abide by this consequence than to put upon it a construction not warranted by the words of the act in order to give effect to what we may suppose to have been the intention of the Legislature. (Lord Tenterden in *King v. Inhabitants of Barham*, 8 Barn. & C. 99.)

It has been suggested that in the phrase "and shall build a roadway above the finished subgrade of wood block pavement upon a cement base, or some other suitable material" the words "or some other suitable material" relate back to and include the words "wood block pavement" as well as the words "cement base," the claim being that this phrase as it stands means the same and is to be given the same effect that it would have if it read "shall build a roadway above the finished subgrade of wood block pavement or some other suitable material, upon a cement base or some other suitable material."

It is suggested that the fact that a comma is found after

the word "base" is of some peculiar force and significance in the construction of this statute. While punctuation may be resorted to as an aid, it is at best of slight value in the interpretation of statutes and has been more frequently disregarded entirely than resorted to for assistance.

The Supreme Court of the United States has said that —

Punctuation is a most fallible standard by which to interpret a writing; it may be resorted to when all other means fail; but the court will first take the instrument by its four corners, in order to ascertain its true meaning; if that is apparent on judicially inspecting the whole, the punctuation will not be suffered to change it. (*Ewing v. Burnet*, 11 Pet. 41.)

In the interpretation of written instruments, very little consideration is given by the courts to the punctuation, and it is never allowed to interfere with or control the sense and meaning of the language used. The words employed must be given their common and natural effect, regardless of the punctuation or grammatical construction. (Black on Interpretation of Laws, §§ 86-88.)

The Supreme Judicial Court of this Commonwealth, in a case in which the punctuation of the draft of a bill as passed by the Legislature to be engrossed was urged in support of a certain theory of statutory construction, said: —

It is unnecessary to resort to the draft of the bill as passed to be engrossed, in order to explain the statute as actually engrossed, for the general rule is that punctuation is no part of a statute. Barrington on Sts. (5th ed.) 439, note. 3 Dane Ab. 558. Dwarris on Sts. (2d ed.) 601. (*Cushing v. Worrick*, 9 Gray, 382.)

Again, in the case of *Martin v. Gleason*, 139 Mass. 183, the Supreme Judicial Court, speaking by Allen, J., began its opinion deciding the case with these words: —

Disregarding punctuation, as may properly be done in construing a statute.

The same doctrine was laid down by the Supreme Judicial Court in the case of *Browne v. Turner*, 174 Mass. 150.

In another case the Supreme Judicial Court said:—

Although it has been held that punctuation may be disregarded (*Cushing v. Worrick*, 9 Gray, 382, 385), it may be resorted to as an aid in construction when it tends to throw light on the meaning. (*Commonwealth v. Kelley*, 177 Mass. 221.)

In a later case the Supreme Judicial Court has again declared that punctuation may be disregarded entirely or resorted to as an aid in construction, and that it is at best only an aid in construction. *Friberg v. Builders' Iron & Steel Co.*, 201 Mass. 458.

Taking up the construction of the phrase above quoted without regard to its punctuation, we find that the ordinary and usual rule of construction in cases like the one presented by your first question has been declared by the Supreme Judicial Court in the following language:—

The ordinary rule of construction in a case like this confines the exception to the last antecedent. . . . See also *Bullard v. Chandler*, 149 Mass. 532. (*Commonwealth v. Kelley*, 177 Mass. 221.)

The words of the statute under consideration are to be read in their ordinary and usual significance. They acquire no new, strange or technical meaning because found in a statute. The phrasing of the sentences of the statute is to be given the same force that would be given to sentences of like phrasing in other writings. The position of the words in the phrase above referred to, in which a succession of particulars is followed by an exception apparently single in purpose, is, in my opinion, of sufficient force to control the meaning of the phrase and make it subject to the ordinary rule of construction, that the exception refers to the last antecedent only, which in the sentence referred to is "cement base." I am aware that this rule, like most rules of construction, is, under certain circumstances, subject to modification, but in my opinion the statute before me presents a proper case for the application of the ordinary rule as established by the Supreme Judicial Court as stated above.

It is therefore my opinion that your commission is not authorized by chapter 778 of the Acts of 1913 to use any material for paving Humphrey Street other than wood block.

Referring to your second question, which relates to the material to be used for paving the approaches to Humphrey Street, we find that no provision for such approaches was made by chapter 778 of the Acts of 1913. The authority to lay out and construct the approaches was conferred on your commission by chapter 398 of the Acts of 1914. By section 1 of the last-mentioned act your commission is authorized "to prepare forthwith or to include in its plans and specifications for the layout and construction of Humphrey street in the town of Swampscott, in accordance with the provisions of chapter seven hundred and seventy-eight of the acts of the year nineteen hundred and thirteen, plans and specifications for such suitable approaches at either end of said Humphrey street as it may deem proper."

It has been urged that the words "in accordance with the provisions of chapter seven hundred and seventy-eight of the acts of the year nineteen hundred and thirteen" mean that the construction of the approaches must in all particulars be identical with the construction of Humphrey Street, and that if the commission is bound by chapter 778 of the Acts of 1913 to use only wood block for paving that street it is bound to use the same material only for paving the approaches to the street.

It is to be observed, however, that the words "in accordance with" do not necessarily relate to the construction of the approaches but to plans and specifications that have been, or that may be, made for the layout and construction of Humphrey Street in the town of Swampscott in accordance with chapter 778 of the Acts of 1913.

The last part of the sentence above quoted from chapter 398 of the Acts of 1914, "for such suitable approaches at either end of said Humphrey street as it [the commission] may deem proper," confers upon your commission authority for the exercise of a broad discretion as to what are or will be suitable

approaches, and as to what your commission may deem proper. It is my opinion that your commission is authorized to exercise its judgment and discretion as to the material to be used for paving the approaches to Humphrey Street.

SEALERS OF WEIGHTS AND MEASURES — SIGNATURES.

The signatures of sealers or deputy sealers of weights and measures on sealed scales should be in the handwriting of the officer who affixes the seal, and not a printed facsimile of his signature.

To the Com-
missioner of
Weights and
Measures,
1914
September 24.

You have requested my opinion upon the following question: —

Would it be legal for the Sealer of Weights and Measures, or deputy sealer, to use a seal . . . with his name printed thereon, or should he sign his name, together with date, in his own handwriting, at the time of sealing a scale or other device?

Your question relates entirely to the necessity of a signature in the handwriting of the officer whose official act is to be attested by the signature.

Clause 25 of section 5 of chapter 8 of the Revised Laws provides that —

The words “written” and “in writing” may include printing, engraving, lithographing and any other mode of representing words and letters; but if the written signature of a person is required by law, it shall always be his own handwriting or, if he is unable to write, his mark.

In a discussion of this provision of the statute the Supreme Judicial Court of the Commonwealth has said: —

We think it was intended to require a signature in the proper handwriting of a person only in those cases where, by express language, or by usage, or by implication arising from the nature of the document to be signed, a written signature is required by law, as the direct personal act of the person whose name is to be signed. Numerous instances of this character are to be found in the Constitution and statutes. For example, a certain oath is required to be taken and subscribed by every person chosen or appointed to any office (Amend. to Mass. Const., Art.

VI.); and the oaths of the Governor, Lieutenant Governor and Councilors are to be taken and subscribed in the presence of the two houses of assembly. Const. Mass., Pt. II., c. VI., art. I. For various statutes respecting the taking and subscribing of oaths by different officers, by insolvent debtors, and by poor debtors, see Pub. Sts., c. 14, § 55; c. 18, §§ 10, 14; c. 21, §§ 3, 4; c. 27, § 88; c. 157, § 76; c. 158, §§ 2, 6; c. 162, § 38. Various certificates also are to be made by different public officers, which according to usage bear their signatures in their own handwriting, such as certificates of the acknowledgment of deeds, and of the taking of oaths. See Pub. Sts., c. 27, § 88; c. 120, § 6; c. 150, § 5; c. 157, § 77; c. 162, §§ 1, 2, 17, 19, 40; c. 169, §§ 40, 48. Commissioners to take acknowledgments in other States and in foreign countries must file in the office of the Secretary of the Commonwealth impressions of their seals, together with their oaths of office and their signatures. This must necessarily imply signatures in the proper handwriting of such commissioners. Another illustration is found in the Twentieth Amendment to the Constitution, though this was not adopted till after the establishment of the statutory rule under consideration. This amendment provides that no person shall have the right to vote or be eligible to office who shall not be able to read the Constitution in the English language, and write his name. A signature in the proper handwriting of the voter or officer is plainly contemplated.

The fact that you ask this question indicates that the use of facsimiles of the signatures of your officers is of doubtful legality, while there is no doubt whatever if the genuine signature is used. The signature of the Sealer or deputy sealer upon such a seal as the one submitted with your inquiry is the attestation of an official act. It is an official signature. Clearly, the safe practice is in every instance to require the signature in the handwriting of the official who is acting, and this, it seems to me, is required by usage. While the question may not be entirely free from doubt, it is my opinion that the official signatures in cases of the kind covered by your question should be in the handwriting of the officer who affixes the seal.

COLD STORAGE EGGS — SALES IN STORAGE — INTERSTATE
SHIPMENTS.

Under St. 1913, c. 538, as amended by St. 1914, c. 545, eggs which are in cold storage when sold, and which are to remain until called for by the purchaser, need not be marked until withdrawn from storage.

Under the statute cold storage eggs withdrawn for sale for consumption within the State or for export are required to be marked.

To the
Commissioner
of Health.
1914
September 29.

DEAR SIR:—You have requested my opinion upon the following questions:—

I. Suppose A owns 1,000 cases of eggs in a storage warehouse in Boston, and sells 500 cases to-day to B, it being understood that B is still to allow the eggs to be kept in storage until such time as he needs them; must A mark these eggs in storage "cold storage eggs"?

II. If A sells to-day 500 cases of eggs in storage to B, whose business is in Newport, R. I., and the eggs are delivered into a car switched into the warehouse, must these eggs be marked "cold storage eggs," it being understood that Rhode Island has no cold storage law?

III. Must all shipments to another State of eggs that have been cold stored be marked "cold storage eggs"?

The statute (section 1 of chapter 538 of the Acts of 1913, as amended by chapter 545 of the Acts of 1914) provides that—

Whenever eggs that have been in cold storage are sold at wholesale or retail, or offered or exposed for sale, the basket, box or other container in which the eggs are placed shall be marked plainly and conspicuously with the words "cold storage eggs," or there shall be attached to such container a placard or sign having on it the said words. If eggs that have been in cold storage are sold at retail or offered or exposed for sale without a container, or placed upon a counter or elsewhere, a sign or placard, having the words "cold storage eggs" plainly and conspicuously marked upon it, shall be displayed in, upon or immediately above said eggs; the intent of this act being that cold storage eggs sold or offered or exposed for sale shall be designated in such a manner that the purchaser will know that they are cold storage eggs. The display of the words "cold storage eggs," as required by this act, shall be in letters not less than one inch in height and shall be done in such a manner as is approved by the state board of health.

Your questions relate to the sale of eggs which are at the time of sale in cold storage. The language of the statute is, "whenever eggs that have been in cold storage are sold," etc. The intention of the Legislature in the enactment of this legislation was to protect the public against the sale of cold storage eggs for those of a more desirable quality.

You call attention to the self-evident fact that eggs that are in cold storage have been in cold storage. Notwithstanding this very apparent fact, I have to say that in my opinion the statute in regard to marking containers and in regard to placards and signs applies to eggs that have been in cold storage and have been withdrawn from cold storage for the purpose of sale or to be offered or exposed for sale, and that the words "eggs that have been in cold storage" as used in this statute do not relate to eggs that are in cold storage when sold or offered for sale.

The purpose of this statute is set forth in the statute itself in the following words: "the intent of this act being that cold storage eggs sold or offered or exposed for sale shall be designated in such a manner that the purchaser will know that they are cold storage eggs." Obviously, when eggs are sold while actually in cold storage, the fact as to storage is necessarily known to both buyer and seller, and the opportunity for fraud as to the fact of storage in such a case does not exist. It is only when eggs in cold storage are withdrawn therefrom that opportunity is offered for fraud in their sale. I therefore answer your first inquiry in the negative; and the answer to this question, with the views above set forth, seems also to dispose of your second inquiry, and further comment seems unnecessary.

In response to your third question I have to say that whenever eggs that have been in cold storage and have been withdrawn therefrom are sold or exposed or offered for sale in this Commonwealth, whether for consumption here or for export, the containers of such eggs must be marked as required by statute.

CIVIL SERVICE — INSPECTORS OF MASONRY CONSTRUCTION —
BUILDING INSPECTORS.

Under St. 1914, c. 540, it is the duty of the Civil Service Commissioners to certify for positions as inspectors of masonry construction only persons who have had practical experience as journeymen masons, but the provisions of this statute do not apply to a building inspector unless his principal duty is the inspection of masonry construction.

To the
Civil Service
Commission.
1914
October 6.

You have requested my opinion upon the following questions: —

First. — Is it the duty of the Civil Service Commission to certify for positions as inspectors of masonry construction only persons who have had practical experience as journeymen masons, or may it certify persons who without any experience as journeymen masons have acquired a knowledge of masonry construction by working as foremen, civil engineers, or architects, or other lines of employment which would give them a knowledge of masonry construction?

Second. — In certifying for the position of building inspectors in the different cities and towns of the Commonwealth, is it the duty of the commission to certify only such persons as have had practical experience as journeymen masons?

The statute in regard to this matter (chapter 540 of the Acts of 1914) provides as follows: —

SECTION 1. Persons employed by the commonwealth, or by any metropolitan board or commission, or by any county, city or town, as inspectors of masonry construction, shall have had at least three years' practical experience in masonry construction, but shall not be required to have technical knowledge as engineers, architects or draftsmen, unless they have other duties for which such knowledge is necessary. The provisions of this section shall apply only to persons whose principal duty is the inspection of masonry construction, consisting of stone, brick or substitutes therefor.

The answer to your question depends upon the definition given to the phrase "practical experience." The word "practical," so far as its definition is necessary in the consideration of this question, may be defined as "relating or pertaining to action, practice, or use: opposed to *theoretical*, *speculative* or *ideal*. (a) Engaged in practice or action; concerned with

material rather than ideal considerations. (b) Educated by practice or experience; as, a *practical* gardener. (c) Derived from experience; as *practical* skill; *practical* knowledge. (d) Used, or such as may advantageously be used, in practice. . . . (e) Exemplified in practice." "Experience" is defined as "a trial, proof, experiment, experimental knowledge. The state or fact of having made trial or proof, or of having acquired knowledge, wisdom, skill, etc., by actual trial or observation; also, the knowledge so acquired; personal and practical acquaintance with anything."

"Experience," then, may be gained either by actual trial or by observation. "Practical experience" clearly means experience gained by actual trial, that is, by the actual manual performance of work in masonry construction. This definition coincides with the popular use of the term "practical experience." It is provided by clause 3 of section 4 of chapter 8 of the Revised Laws that —

Words and phrases shall be construed according to the common and approved usage of the language; but technical words and phrases and such others as may have acquired a peculiar and appropriate meaning in the law shall be construed and understood according to such meaning.

The popular use of the word "practical," as applied to various callings, as, a practical gardener, practical mechanic, practical farmer, coincides with the definition and construction above given.

I have not found any decision of the Supreme Court defining the phrase "practical experience." My attention has been directed to the cases of *State v. Starkey*, 49 Minn. 503, and *People v. Board of Aldermen*, 42 N. Y. Supp. 545, but a distinction may readily be drawn between each of these cases and the question now under consideration.

It is my opinion that under this statute your commission could certify for positions as inspectors of masonry construction only such persons as have had three years' experience as journeymen masons.

In answer to your second question I have to call your

attention to the language of the statute itself: "the provisions of this section shall apply only to persons whose principal duty is the inspection of masonry construction, consisting of stone, brick or substitutes therefor." This seems to me clearly to answer your question. The fact that a building inspector of a city or town may at some time be required to inspect masonry construction does not affect his qualification for appointment unless his principal duty is the inspection of that kind of work.

CIVIL SERVICE — FOREMEN AND INSPECTORS — VACANCIES.

Whenever the Civil Service Commission is required to certify a list of names of persons by reason of a vacancy in the position of foreman or inspector in any department, it must, when practicable, include the name of one person serving as a laborer or mechanic in such department.

To the
Civil Service
Commission.
1914
October 21.

You ask for a construction of chapter 479 of the Acts of 1914, and whether your commission shall certify for each vacancy the name of one person who is serving as a laborer or mechanic in any department, or whether the person to be certified must have had special experience in the service required in the position which he is to fill.

The statute is clear and is, I think, to be taken literally. It reads as follows: —

Whenever an appointing officer or board shall make requisition upon the civil service commission to fill a vacancy or vacancies in the position of foreman or inspector, and a request is made in said requisition for the certification of persons having had experience in the department from which the requisition comes, the commission shall, so far as may be practicable, include among the names certified the name of at least one person for each vacancy who is serving as a laborer or mechanic in such department.

The words "persons having had experience in the department" are not, in my opinion, to be taken to mean experience in some special work of the department. The last clause of section 1 — "the commission shall, so far as may be practicable, include among the names certified the name of at least

one person for each vacancy who is serving as a laborer or mechanic in such department" — should be construed exactly as it reads; that is, any person serving as a laborer or mechanic in such department is eligible to certification.

BOARD OF EDUCATION — SUPERINTENDENCY UNION — TOWNS.

Under St. 1914, c. 556, only such towns as are required to *join* a superintendency union are required to *belong* to such a union.

I am in receipt of your letter making inquiry as follows: —

To the
State Board
of Education.
1914
November 12.

Chapter 556 of the Acts of 1914 places upon the Board of Education the responsibility of establishing standards of organization, equipment and instruction for high schools maintained by the towns required to belong to a superintendency union. In the discharge of this duty the Board finds it is necessary to secure the opinion of the Attorney-General as to the interpretation of the phrase "required to belong to a superintendency union."

In my opinion the words in question refer only to towns required to join a union; *i.e.*, to the towns enumerated in section 43 of chapter 42 of the Revised Laws. The fact that other towns which have the option of joining a union may, by joining voluntarily, render themselves forever bound to that union, does not classify them as towns "required to belong to a superintendency union."

METROPOLITAN PARK COMMISSION — DEEDS — MERCANTILE PURPOSES.

A waiting room used for the sale of ice cream, soda, etc., comes within the restriction in a deed of land prohibiting the use of a building for mercantile purposes.

Where similar building restrictions are attached to different portions of a tract of land, each grantee has a right in the nature of an easement which may be enforced against the grantee of another lot.

You have submitted to me various inquiries relative to a certain deed of Eugene G. Ayer. The facts are briefly as follows: when your Board constructed Fellsway West under

To the Metro-
politan Park
Commission.
1914
November 19.

the authority of chapter 288 of the Acts of 1894, all of the deeds which you obtained from the owners of land taken imposed certain restrictions on the remaining land of the owners. These restrictions contained substantially the following language: —

No building erected or placed upon said premises shall be used for a livery or public stable or for any mechanical, mercantile or manufacturing purposes.

Such a deed was received from Eugene G. Ayer. He now proposes to erect a building on his land covered by these restrictions, to be used as a general waiting room for the traveling public, and for the sale of ice cream, soda, cigars and tobacco, and such light commodities as are usually sold in street railway waiting rooms, and for the purposes of a drug store.

You have requested my opinion on the following points: —

I. Would the use of this building, as set forth in the petition of Mr. Ayer, be for mechanical, mercantile or manufacturing purposes, and in violation of said restrictions?

II. Would a building of the nature and cost above set forth be erected and maintained in violation of said restrictions?

III. Has this Board authority under any circumstances to release this land from the operation of restrictions imposed in the manner above set forth?

IV. What would be the effect on the authority of the Board to enforce similar restrictions on other lands abutting on said Fellsway West, if it has authority to and should release the land of Ayer in question from the operation of the particular restrictions referred to above?

With regard to the first point, our Supreme Judicial Court has recently quoted with approval the following definitions: —

The word "merchant" is defined in the Century Dictionary as "one who is engaged in the business of buying commercial commodities and selling them again for the sake of profit, especially one who buys and sells in quantity or by wholesale," or "a shopkeeper or storekeeper," and "mercantile" is defined thus: "Of or pertaining to merchants or the traffic carried on by merchants; having to do with trade or commerce, trading, commercial." (*Carr v. Riley*, 198 Mass. 70, 75.)

Both that definition and the common acceptance of the word clearly show that the use of the building as contemplated by Mr. Ayer is for mercantile purposes.

With regard to the second point, it naturally follows from the answer to your first question that such a building would violate the restrictions.

With regard to the third point.

It is a familiar principle of law, which has been applied in many cases, that when one makes deeds of different portions of a tract of land, each containing the same restriction upon the lot conveyed, which is imposed as a part of a general plan for the benefit of the several lots, such a restriction not only imposes a liability upon the grantee of each lot as between him and the grantor, but it gives him a right in the nature of an easement, which will be enforced in equity against the grantee of one of the other lots, although there is no direct, contractual relation between the two. (*Evans v. Foss*, 194 Mass. 513, 515.)

The principle should be the same when the restrictions are imposed by deeds from the various owners to a central authority instead of from one person to various owners. The other abutters on Fellsway West who have given deeds similar to that of Mr. Ayer have a right in Mr. Ayer's land in the nature of an easement which your Board cannot release. I therefore answer your third question in the negative.

The answer to the third inquiry disposes of the fourth.

TEACHERS' RETIREMENT ACT — EVENING SCHOOLS.

teacher who resigned in 1911 as principal of a public school, but who has since been employed in evening school work, is not eligible for retirement under the provisions of St. 1913, c. 832.

You have asked my opinion as to whether the facts relating to the petition of Mr. Dwight Clark for a pension come within the scope of the teachers' retirement act (St. 1913, c. 832). The facts as we understand them are as follows: Mr. Dwight Clark, eighty-three years of age, has been connected with the

To the
Teachers Retirement Board.
1914
November 25.

teaching force of the city of Springfield for fifty-one years. Because of failing health Mr. Clark resigned his principalship in June, 1911, but the school board intended to continue his service in the public schools, and engaged him in evening school work for the two years following. Since September, 1913, Mr. Clark has been re-employed in the day school service.

Paragraph (5) of section 6 of this act provides —

Any teacher who shall have become a member of the retirement association under the provisions of paragraph numbered (2) of section three, and who shall have served fifteen years or more in the public schools of the commonwealth, not less than five of which shall immediately precede retirement. . . .

The word “teacher” as used in this act is defined in section 1, paragraph (4), as “any teacher, principal, supervisor or superintendent employed by a school committee, or board of trustees, in a public day school within the commonwealth.”

The words “public school” are defined in section 1, paragraph (5) as “any day school conducted within this commonwealth under the order and superintendence of a duly elected school committee and also any day school conducted under the provisions of chapter four hundred and seventy-one of the acts of the year nineteen hundred and eleven.”

The language of the statute with relation to a consideration of the questions involved in this particular case admits of only one interpretation, namely, that a teacher before he is eligible for a pension “shall have served fifteen years or more in the public schools of the commonwealth, not less than five of which shall immediately precede retirement.” This language specifically precludes the presumption that service in the evening schools is included within the scope of the public school service. It follows, therefore, that Mr. Clark’s service in the evening schools was not a remedy for the interruption of his service in the public school service, and the two years devoted to the evening schools cannot be reckoned as a period of his service in the public schools within the meaning of the words as used in the statute.

I note that it was the intention of the school board to continue Mr. Clark in the public school service, but I am limited and confined by the statutory definitions and prescriptions which require service in the public day schools, and make no provision for evening school work, so that permanent and continuous employment in an evening school is neither a substitute nor a remedy for the lack of the required continuous service in day school work.

I again refer you to the words "teacher" and "public schools" as specifically defined for the purposes of this act.

INTERNAL REVENUE — TAX ON INSURANCE POLICIES — REBATES.

Under the Federal internal revenue law insurance companies are required to pay the tax on policies.

If the tax on insurance policies is added by insurance companies to the premiums it would be a violation of the anti-rebate law for agents to pay the amount of the tax.

I have received from you a request in the following language: —

To the
Insurance
Commissioner.
1914
December 4.

The new internal revenue law, which goes into effect on December 1 next, puts a tax upon insurance policies thereafter issued. I beg to inquire whether fire insurance companies may, under the law, collect the amount of this tax from the policyholders without making it a part of the consideration or premium for the policies?

Also whether, if the answer to this question is that the companies may collect the tax from the policyholders as a separate matter from the premium, agents who pay the tax instead of collecting it from their customers could be guilty of rebating?

The Federal act of Oct. 22, 1914, contains the following provisions: —

Sec. 6. That if any person or persons shall make, sign, or issue, or cause to be made, signed, or issued, any instrument, document, or paper of any kind or description whatsoever, without the same being duly stamped . . . such person or persons shall be deemed guilty of a misdemeanor, . . .

SEC. 11. That any person or persons who shall register, issue, sell, or transfer, or who shall cause to be issued, registered, sold, or transferred, any instrument, document, or paper of any kind or description whatsoever mentioned in Schedule A of this Act, without the same being duly stamped, . . . shall be deemed guilty of a misdemeanor, . . .

SCHEDULE A.

Stamp Taxes.

Insurance: Each policy of insurance . . . upon property of any description . . . made by any person, association, or corporation, upon the amount of premium charged, one-half of 1 cent on each dollar or fractional part thereof: *Provided*, That purely cooperative or mutual fire insurance companies or associations carried on by the members thereof solely for the protection of their own property and not for profit shall be exempted from the tax herein provided: . . .

Each policy of insurance . . . of indemnity for loss, damage, or liability issued, or executed, or renewed by any person, association, company, or corporation, . . . upon the amount of premium charged, one-half of 1 cent on each dollar or fractional part thereof.

Briefly, the Federal law in question imposes a stamp tax on certain insurance policies. From sections 6 and 11, above quoted, it is clear that the tax is on the person issuing the policy. This is made more clear by the fact that the proviso above quoted exempts certain companies rather than their policies or their customers. Thus the tax is for the insurance companies to pay.

But from this it does not follow that the companies may not pass the tax along.

Insurance companies, however, have no authority in law to charge their customers for a part of their running expenses, except as such expenses are included in and form a part of the consideration paid for insurance. If this tax could be passed on, as such, to the customers, so could local taxes, office rent, etc. The charging of doctors' fees for examinations of applicants is no precedent, for there an actual service is rendered; and, in fact, it is usual not to charge such fees if the policy is finally written.

There is, however, no legal limit on premiums in Massachusetts, the only requirements being that they be uniform and set forth in the policy. Therefore, an insurance company may lawfully add, as a part of the premium, the amount of the Federal tax; that is, the premium to be paid for insurance may be increased by that amount, but the company cannot charge the Federal tax in addition to the premium.

In the case of fire insurance companies, St. 1911, c. 493, provides a board of appeal, with recommendatory powers. I suggest that as to this class of companies this board has authority to pass upon the question of including the Federal tax in the premiums and to make such recommendations as may seem meet.

With respect to the anti-rebate law, I will say that if the tax is included in the premium it would clearly be rebating for the agent to pay it. But, if not so included, the agent has merely paid an obligation of the company, which cannot possibly be a rebate to the customer.

CIVIL SERVICE — DEPARTMENT OF FIRE PREVENTION
COMMISSIONER.

Under St. 1914, c. 795, the appointees in the department of the Fire Prevention Commissioner are subject to the provisions of the civil service law and rules.

You have requested my opinion as to the status under civil service requirements of the appointees in the department of the Fire Prevention Commissioner. R. L., c. 19, § 9, provides as follows: —

To the
Civil Service
Commission.
1914
December 7.

Judicial officers and officers elected by the people or by a city council, whose appointment is subject to confirmation by the executive council or city council of any city, officers elected by either branch of the general court and the appointees of such officers, heads of principal departments of the commonwealth or of a city, the employees of the treasurer and receiver general, of the board of commissioners of savings banks, and of the treasurer and collector of taxes of any city, two employees of the city clerk of any city, teachers of the public schools, the secretaries and

confidential stenographers of the governor, or of the mayor of any city, police and fire commissioners and chief marshals, or chiefs of police and fire departments, shall not be affected as to their selection or appointment by any rules made as aforesaid; but, with the above exception, such rules shall apply to members of police and fire departments.

Acts of 1914, chapter 795, entitled "An Act to provide for the better prevention of fires throughout the metropolitan district," in section 1 defines certain words. At the end of section 2 it is provided as follows: —

Subject to the approval of the governor and council, the commissioner shall be provided with suitable offices suitably furnished and equipped for the performance of his duties. Subject to the approval of the governor and council, the commissioner may employ such clerks, stenographers and office employees, engineering and legal assistance as he may deem necessary.

It is a general rule of statutory construction, to be applied under proper conditions and with important limitations, that the express mention of one person, thing or consequence is tantamount to the express exclusion of all others. Black on Interpretation of Laws, p. 219.

It would seem that "proper conditions" and "important limitations" are observed for the purpose of applying this particular principle to the case in hand. The section of the Revised Laws above quoted having expressly mentioned the persons and classes of persons who shall be exempt from the civil service requirements, it must be taken that the appointees about whom you inquire cannot be exempt unless they fall within a class or group mentioned expressly in the section of the Revised Laws above quoted.

Obviously, the only phrase or clause mentioning a class into which they could fall is "whose appointment is subject to confirmation by the executive council." The only ground upon which it could be contended that the appointees in question may fall within the class coming under this phrase is that the phrase "subject to the approval of the governor and council," in St. 1914, c. 795, means the same thing as the phrase "sub-

ject to confirmation by the executive council" in the quoted section of the Revised Laws. This contention is not well taken.

In an opinion rendered by one of my learned predecessors, Hon. Dana Malone, upon a similar matter, it was said: —

I am of opinion that the approval of the employment and compensation of clerks in the several departments of the Commonwealth is not an exercise of this function (meaning the function of confirmation of appointments exercised by the Executive Council, provided for by the Constitution and mentioned in the above-quoted section of the Revised Laws), even as designated in R. L., c. 19, § 9, and is rather an approval by the Council, acting with the Executive, of a scheme for proposed appointments and expenditures, than a confirmation of the particular appointment to be made.

I see no reason to differ from that opinion.

It follows, therefore, that the proposed appointments are not exempt from the requirements of the civil service.

PUBLIC SCHOOLS — TUITION OF NONRESIDENT PUPILS.

Where pupils are attending school in a town other than that of their residence, the cost of such attendance should be computed on the average expense for each pupil in that school, and not on the average expense for pupils in such town.

I am in receipt of your letter requesting my interpretation of St. 1913, c. 779, § 4. A State minor ward between the ages of five and fifteen years has been placed elsewhere than in his own home by the State Board of Charity and is receiving his education in the public schools of that town. The school committee has expressed its desire for reimbursement at the so-called "average expense rate."

You ask: —

Shall the amount reimbursed by the State in this case be an amount equal to the average expense for each pupil in the particular school which the State minor ward is attending, or shall it be an amount equal to the average expense per pupil in all of the public schools of the said town?

To the
State Board
of Charity.
1914
December 9.

The language of the statute seems perfectly clear on this point. The words are, "an amount equal to the average expense for each pupil of such school." It is to be noted that the word "school" is singular and not plural. Although the word "such" has apparently no antecedent in the paragraph containing it, and although this paragraph refers to "attendance of every such child in the public schools," yet preceding paragraphs of the same section contain the word "school" in the singular. The first paragraph contains the words "attend school," "attending school," "such school." The second paragraph contains the words "attend school," "admission to a school." Only in the paragraph in question is the word "school" used in the plural.

In the paragraph relative to reimbursement for transportation it is clear that the average expense to the individual school in question is contemplated.

Taking all these matters together it is my opinion that the words "such school" in the third paragraph refer to the particular school which the child in question attends.

PRISON COMMISSIONER — PRISON CAMP — LABOR.

Under R. L., c. 225, §§ 63 and 65, the employment of prisoners at the Prison Camp is limited to the reclamation and improvement of waste places, the cultivation of lands and the preparing of material for road building.

To the Board
of Prison Com-
missioners.
1914
December 10.

You have requested my opinion upon the following questions: —

First. Is employment of prisoners at the Prison Camp limited to reclaiming land and to road building?

Second. If such employment is not limited, is it within the power vested in the Prison Commissioners to establish at said Prison Camp such industries, in addition to reclaiming land and road building, as in their opinion are best suited to the institution and its inmates?

R. L., c. 225, §§ 63 and 65, provide as follows: —

SECTION 63. The governor and council may purchase or otherwise take in fee any parcel of waste or unused land, not exceeding one thousand

acres in area, for the purpose of reclaiming, improving and disposing of it for the benefit of the commonwealth. When land has been so taken, the governor and council shall cause a description thereof as certain as is required in an ordinary conveyance of land to be filed in the registry of deeds for the county or district in which the land lies, with a statement, signed by the governor, that it is taken on behalf of the commonwealth for the purposes described in this section. The act and time of filing such description shall be considered the act and time of taking such land, and shall be sufficient notice to all persons that the land has been so taken. The title to such land shall then vest in the commonwealth.

SECTION 65. After such land has been so taken, the prison commissioners, with the approval of the governor and council, shall cause iron buildings of cheap construction to be erected thereon for the accommodation of not more than one hundred prisoners. When such buildings are ready for occupancy, the governor may issue his proclamation establishing on such land a temporary industrial camp for prisoners, and the prison commissioners may appoint a superintendent thereof, who shall hold his office at their pleasure, give such bond as they require, receive such salary as they determine and who shall have the custody of all prisoners removed thereto. The superintendent, with the approval of the prison commissioners, may appoint and determine the compensation of assistants, and they shall hold their office at his pleasure.

Section 66 contained an explicit provision that prisoners at a camp should be employed in reclaiming and improving land and in preparing material for road building, but this section was expressly repealed by section 5 of chapter 243 of the Acts of 1904, while section 1 of that act provides as follows:—

Prisoners who are removed to the temporary industrial camp for prisoners shall be governed and employed there under regulations made by the prison commissioners. The Massachusetts highway commission and the board of agriculture shall from time to time, at the request of the prison commissioners, give to them such information as may enable them to prosecute to the best advantage the work of reclaiming and improving waste land and of preparing material for road building by hand labor.

It will be seen that the provision of section 66 above referred to was omitted in the revision of that section, and as the law now stands prisoners in the Prison Camp and Hospital shall be

governed and employed there under regulations made by the Prison Commissioners.

The authority of your commission appears to be limited by section 1 of chapter 633 of the Acts of 1913, which provides as follows: —

During all times in which outdoor labor is practicable, inmates of penal institutions who are required to labor shall be employed, so far as is possible, in the reclamation of waste places, and in cultivating lands for raising produce to be used in public institutions. Prisoners so employed shall be at all times in the custody and under the direction of the prison officers.

The intention and purpose of the Legislature to make the work of reclaiming land and preparing material for road building the principal industry at the Prison Camp are indicated by the provisions of section 1 of chapter 243 of the Acts of 1904, that the Highway Commission and the Board of Agriculture shall, upon request of your Board, give such information as may enable you to prosecute to the best advantage the work of reclaiming and improving waste land, etc., as well as by section 1 of chapter 633 of the Acts of 1913, above quoted. But I think that as the statutes now stand your Board is not absolutely precluded from employing prisoners at the Prison Camp in suitable lines of industry other than the reclamation and improvement of land and preparing material for road building at such times as it may be found impracticable to carry on this work.

I note that road building is mentioned in both your questions. May I suggest that preparing material for road building is the industry named in the statute.

It is my opinion that the employment of prisoners at the Prison Camp is limited to the reclamation and improvement of waste places, the cultivation of lands for raising produce to be used in public institutions, and preparing material for road building, during all the time when outdoor labor is practicable, and that your Board may provide for such period of time as outdoor work is not practicable such employment as is best suited to the welfare of the prisoners.

CO-OPERATIVE BANKS — LOANS — REDUCTION OF RATE.

A co-operative bank authorized by its by-laws to dispense with offering its money for bids, and in lieu thereof to loan money at not less than 5 per cent., as fixed by its directors, may reduce the rate of interest to any rate not less than 5 per cent. to a borrower who applied for and received a loan at a rate fixed by the board of directors when the loan was made.

You have requested my opinion upon the following question: —

To the
Bank Com-
missioner.
1914
December 16.

In a case in which a co-operative bank is authorized by its by-laws to loan its money at such rate of interest, not less than 5 per cent. per annum, as may be fixed from time to time by its directors, in lieu of offering money for bids, may such bank reduce the rate of interest to a borrower who applied for and received a loan at the rate so fixed by the board of directors when the loan was made, or can the rate be reduced only in cases where the bank offers its money for bids?

St. 1912, c. 623, §§ 19 and 26, provide as follows: —

SECTION 19. The funds accumulated, after due allowance for all necessary expenses and the payment of shares, shall, at each stated monthly meeting, be offered to applicants according to the premium bid by them for priority of right to a real estate or share loan, which shall consist of a percentage charged on the amount loaned in addition to interest, at a rate not less than five per cent per annum, payable in monthly instalments. If the corporation so provides in its by-laws, the bid for loans shall, instead of a premium, be a rate of annual interest not less than five per cent per annum payable in monthly instalments upon the amount desired. Any such corporation may, when so authorized by its by-laws, dispense with the offering of its money for bids, and in lieu thereof may loan its money at such rate of interest not less than five per cent per annum or interest and premium as may be fixed, from time to time, by the board of directors, in which case the priority of right to a loan shall be decided by the priority of the approved applications therefor. Such bids or rates shall include the whole interest to be paid and may be at any rate not less than five per cent per annum.

SECTION 26. If a borrower purchases money at a lower rate than that paid by him on an existing loan, secured by a mortgage, for the purpose of reducing the premium or rate of interest upon said loan, a new mortgage shall not be required, but an agreement in writing for the reduction of said premium or rate of interest, signed by the bor-

rower and the treasurer of the bank, with the written approval of the president, shall be valid, and shall not impair or otherwise affect the existing mortgage; and thereafter the borrower shall make the monthly payments on the loan in accordance with the terms of said agreement, and the amount of money previously so purchased by him may be resold by the bank at the same meeting.

Your question appears to have been suggested, in part at least, by the use of the phrase in the statute, "if a borrower purchases money," etc., in section 26, and by the idea that one who obtains a loan of money by bidding for it purchases the money, and that one who borrows money at a rate of interest not less than 5 per cent. fixed by the directors of the bank is not one who purchases.

The answer to your question, then, turns, in part at least, upon the scope and meaning of the word "purchase" as used in the statute. This word is defined as —

A term including every mode of acquisition of estate known to the law, except that by which an heir on the death of his ancestor becomes substituted in his place as owner by operation of law. (Bouvier's Law Dictionary.)

It is further defined as —

Acquisition; the obtaining or procuring of something by effort, labor, sacrifice, work, conquest, art, etc., or by the payment of money or its equivalent; procurement; acquirement. (Century Dictionary.)

These definitions indicate that the word "purchase" is not confined in its meaning to the process of bidding for something, nor to the acquisition of property by the payment of money, but to many other and different transactions, and that one who procures a loan from a bank at a rate of interest fixed by its directors is just as truly a purchaser of a loan as the man who procures a loan by bidding for it.

Your question may have been suggested also, in some part at least, by the fact that in those cases in which the bank loans its money at a rate fixed by the directors a written application is made for the loan; but the man who bids for the loan makes application for a loan at the rate named in his bid.

It is my opinion that a co-operative bank authorized by its by-laws to dispense with offering its money for bids, and in lieu thereof to loan money at a rate of interest not less than 5 per cent., fixed from time to time by its directors, may reduce the rate of interest to any rate not less than 5 per cent. per annum to a borrower who applied for and received a loan at a rate fixed by the board of directors when the loan was made, and that all the provisions of section 26 of chapter 623 of the Acts of 1912 apply to such a transaction.

CONSTITUTIONAL LAW — CITIES — CHARTERS — GENERAL ACT.

The Legislature has no authority to enact a general municipal corporation act, giving cities the right to adopt one of several forms of charters, without further special legislative enactment.

Authority to legislate so as to amend a city charter cannot be granted to a city.

It is within the power of the Legislature to enact a general act giving cities the right to change, alter, consolidate, create or abolish departments without special legislation in each particular instance.

The Legislature has power to authorize a city to choose by vote between two or more charters, and may provide that a form of charter once adopted shall remain in force for a fixed term of years.

You have requested my opinion upon the following questions: —

To the Joint
Special Com-
mittee on City
Charters.

1914

December 18.

1. Can the Legislature enact a general municipal corporation act, the effect of which will be to permit cities to adopt one of several forms of charters set forth in such municipal corporation act without further special enactment on the part of the Legislature?

2. Can the Legislature in such act or otherwise make provision for changes in existing charters without further special enactment on the part of the Legislature; *i.e.*, leave the charter in the main as heretofore granted, but giving authority to make changes in minor provisions?

3. Can the Legislature enact a general act which will give to cities the right to change, alter, consolidate, create or abolish departments as convenience or exigency demands, without further special legislation in each particular instance?

4. Can provision be made in the general act above referred to that when a municipality has rejected one of the several forms therein set

forth, the same shall not again be available; *i.e.*, voted upon, for a fixed term of years thereafter?

(a) If accepted, that no other form shall be acted upon for a fixed term of years thereafter.

Article IV. of Section I. of Chapter I. of Part the Second of the Constitution of Massachusetts provides as follows:—

Full power and authority are hereby given and granted to the said general court, from time to time to make, ordain, and establish, all manner of wholesome and reasonable orders, laws, statutes, and ordinances, directions and instructions, either with penalties or without; so as the same be not repugnant or contrary to this constitution, as they shall judge to be for the good and welfare of this commonwealth, and for the government and ordering thereof, and of the subjects of the same. . . .

Article II. of the Amendments to the Constitution provides:—

The general court shall have full power and authority to erect and constitute municipal or city governments, in any corporate town or towns in this commonwealth, and to grant to the inhabitants thereof such powers, privileges, and immunities, not repugnant to the constitution, as the general court shall deem necessary or expedient for the regulation and government thereof, and to prescribe the manner of calling and holding public meetings of the inhabitants, in wards or otherwise, for the election of officers under the constitution, and the manner of returning the votes given at such meetings. Provided, that no such government shall be erected or constituted in any town not containing twelve thousand inhabitants, nor unless it be with the consent, and on the application of a majority of the inhabitants of such town, present and voting thereon, pursuant to a vote at a meeting duly warned and holden for that purpose. And provided, also, that all by-laws, made by such municipal or city government, shall be subject, at all times, to be annulled by the general court.

Under the constitutional provisions above quoted it is my opinion that the special action of the Legislature is necessary to the erection and constitution of city governments. Indeed, no such government can be erected or constituted in any town unless it be with the consent and upon the application of a majority of the inhabitants of such town. That is, the

inhabitants of a town who desire to have a city government instituted in their municipality cannot, in my opinion, be permitted or authorized to adopt a form of charter and establish a city government without first making the application to the General Court provided for in Article II. of the Amendments to the Constitution; and to establish a city government this must be followed by some action of the General Court in accordance with the provisions of the Constitution for the establishment of a city government. It is my opinion, therefore, that your first question, as it stands, must be answered in the negative. It would be possible, however, for the General Court to establish two or more standard forms of charter, and upon each and every application for a charter or for a change of charter to enact a special law submitting these different forms, or some of them, to the choice by vote of the people of the municipality concerned.

Referring to your second question, it is my opinion that the authority to legislate so as to amend its charter cannot be granted to a city under our present Constitution.

In response to your third inquiry, such a provision as this question contemplates may be incorporated in the charter of a city, and might, in my opinion, be incorporated in a general act. It will, of course, occur to you that such an act would have no permanence but would be subject to amendment and repeal at the pleasure of the Legislature.

In answer to your fourth inquiry, if the Legislature authorizes the people of a city or town to choose by vote between two or more charters, it may, in my opinion, provide that the rejected form or forms shall not again be submitted to the people of the city wherein the rejection has taken place, nor be voted upon for a fixed term of years after such rejection; and that a form of charter once accepted and adopted shall remain in force for a fixed term of years after such acceptance or adoption.

SCHOOLS — DOMICIL OF PARENT — TUITION.

The domicil of the parent of a minor attending school is the domicil of the minor, and the city of such domicil is responsible for the tuition of the child.

To the
State Board of
Education.
1914
December 24.
—

In your letter of recent date you state the following case: —

It appears that a child resides during the spring and fall months in a town adjoining a city in which the father of the child is a legal voter. The child attends school in the city. Said city claims that the town in which the child resides should pay tuition during the time of such residence. The town claims that the city, by virtue of the fact that the father of the child is a legal voter therein, is responsible for all the schooling of the child.

You ask to be advised as to the solution of the question whether the city or the town is right in the claims above stated.

I assume that the domicil of the father is, for all purposes, in the city in which he is a voter. It is a well-established rule of law that the domicil of a child follows that of the father. An infant, being *non sui juris*, is incapable of fixing his domicil, which therefore, during his minority, follows that of the father, provided such child is legitimate, and the mere separation of the parents does not affect the application of the rule. 14 Cyc., pp. 843-844.

By application of this rule it follows that since the father of the child has his domicil in the city, the city is responsible for the schooling of the child.

TEACHERS' RETIREMENT BOARD — SUBSTITUTE TEACHERS.

Only such substitute teachers as are duly elected and regularly employed on a salary are entitled to participate in the teachers' retirement fund, under St. 1913, c. 832.

To the
Teachers' Retirement Board.
1914
December 31.
—

I am in receipt of your letter requesting an opinion as to whether substitute service performed by former teachers in the public schools is service within the meaning of paragraph 7 of section 6 of chapter 832 of the Acts of 1913.

The definition of "teacher" in the act might be broad enough to include call substitutes. St. 1913, c. 832, § 1, par. 4.

But the act must be taken as a whole. It contemplates that the members shall be on a regular salary and shall serve throughout the school year. This is clearly shown by the following proviso: —

When the total sum of assessments on the salary of any member at the rate established by the retirement board would amount to more than one hundred dollars or less than thirty-five dollars for any school year, such member shall in lieu of assessments at the regular rate be assessed one hundred dollars a year or thirty-five dollars a year as the case may be, payable in equal instalments to be assessed for the number of months during which the schools of the community in which such member is employed are commonly in session. (St. 1913, c. 832, § 5, par. 2.)

Even construing the definition by itself, the word "employed" may mean *regularly* employed. The United States Supreme Court has ruled: —

The terms "officers" and "employees" both, alike, refer to those in regular and continual service. Within the ordinary acceptance of the terms, one who is engaged to render service in a particular transaction is neither an officer nor an employee. They imply continuity of service, and exclude those employed for a special and single transaction. (*Louisville R.R. Co. v. Wilson*, 138 U. S. 501, 505.)

This interpretation is strengthened by the rest of the act before us. The act would be unworkable if it applied to call substitutes. For if it so applied it would be impossible to draw a line at any one point between those who were called for constant service and those who were called for only one day. The absurdity of applying the minimum assessment of \$35 to a substitute who works only one day is apparent. Equally apparent is the absurdity of placing a substitute who serves a few days a year for thirty years on a par with a teacher who serves steadily for thirty years, with respect to receiving an annuity of \$300 under section 6, paragraph 5. It is therefore my opinion that the act applies only to teachers in regular salaried positions.

You say with respect to call substitutes —

None of these teachers has been elected as permanent substitute at a guaranteed salary by the school committees, and the amount of compensation is entirely on a *per diem* basis for actual day's service rendered.

Teachers of this class cannot, in my opinion, be regarded as eligible to participation in the benefits of the retirement system. I understand, however, that there are substitute teachers in the Commonwealth who are duly elected as such by the school boards, whose entire time throughout the school year is devoted to teaching and who are paid a regular salary. Substitute teachers of the last-named class are, in my opinion, entitled to participate in the retirement system and may, of course, properly become members of the retirement association. This ruling makes the act apply, as above stated, only to teachers in regular salaried positions.

PUBLIC INSTITUTIONS — WATER PIPES — HIGHWAYS —
GRANT BY SELECTMEN.

Selectmen of towns may authorize the laying of water pipes in streets by trustees of a public institution.

You have requested my opinion upon the following question: —

Is it necessary to have the Legislature authorize the Board of Trustees to lay a water pipe in highways in Lakeville, or would it be sufficient for the board of selectmen to grant this franchise?

Chapter 459 of the Acts of 1903 provides as follows: —

SECTION 1. The mayor and aldermen of a city and the selectmen of town may, upon terms and conditions prescribed by them, authorize persons and corporations to lay pipes and conduits for the conveyance of water under any public way in such city or town: *provided, however*, that nothing in this act shall authorize persons or corporations to supply water to persons or corporations other than themselves, in any city or town in which a municipal water plant is established, except with the consent of the board or authority having charge of such water plant in such city or town.

R. L., c. 8, § 5, cl. 16, provides that the word "person" may extend and be applied to bodies politic and corporate.

It is my opinion that the authorization of the board of selectmen would be entirely sufficient. If, however, the selectmen will not grant you the authority needed, I would suggest that you apply to the Legislature for such authority as you may need.

CITIES AND TOWNS — SCHOOL DEPARTMENTS — MANUAL TRAINING SCHOOLS — LIABILITY FOR ACCIDENTS.

Cities and towns conducting manual training schools in compliance with law and deriving no pecuniary benefit therefrom are not liable in damages for injuries resulting to pupils from accidents, nor are school officers so liable except for their own wrongful conduct or negligence.

You have requested my opinion upon the following question:—

To the
State Board of
Education.
1915
January 6.

Is either the school department of a city or the city itself liable in damages for personal injury to pupils resulting from accidents in the manual training work in the schools?

By the provisions of section 9 of chapter 42 of the Revised Laws "the teaching of manual training" as a part of the elementary and high school system is required by law in all towns and cities having a population of 20,000 or more. It will be seen that it is not optional with a city or town having the required population to establish a department of manual training or not, as it may see fit. The law is mandatory. Manual training must be made a part of the educational system of every such city or town. The city or town derives no pecuniary profit or benefit from the manual training department. The school officers are not the agents of the city but are public officers whose duty it is to perform and discharge certain functions as required by law. A municipality is not liable in damages for the acts of its public officers.

The rule relating to the subject-matter of your question has been stated in the following language:—

Whether the neglected duty involves a liability depends, in the judgment of the court, upon the nature of the duty; that is to say, whether it is imposed for the pecuniary profit or other special advantage of the city, — if so, the city is liable; or whether it is a duty imposed upon the city as a public instrumentality of the State, without pecuniary or other special advantage to the city, — if so, the city is not liable. (Dillon on Municipal Corporations, Vol. IV., § 1643.)

See, also, *Hill v. Boston*, 122 Mass. 344.

The city or town conducting a manual training school in strict compliance with the requirements of the law and deriving no pecuniary benefit therefrom will not, in my opinion, be liable in damages for injuries resulting to pupils from accidents in such department; nor will the school officers be liable except for injuries caused by their own wrongful act or negligence.

LABOR — RIGHT TO FINE EMPLOYEES FOR DAMAGES.

Except in certain cases prohibited by statute, employers of labor may, where provision is made in the contract of employment, lawfully withhold money, due employees as wages, to cover damage to the employer caused by the negligent or wrongful act of the employee.

To the State
Board of Labor
and Industries.
1915
January 6.

You have requested my opinion upon the following question: —

Have employers of labor the right to fine employees for damage done by them, as in the breaking of dishes, spoiling goods in process of manufacture or damage to machinery?

A servant is directly liable to his master for any damage occasioned by his negligence or misconduct in connection with his work, whether such damage be directly to the property of the master or arises from compensation which he has been obliged to make to third persons for injuries sustained by them through the negligence or misconduct of the servant. 26 Cyc., 1023.

In a case in which the plaintiff sued a subcontractor on work done for the plaintiff, charging the subcontractor with negligence, the Supreme Judicial Court said: —

It is immaterial whether the defendants are to be regarded as the servants and agents of the plaintiff or as contractors under the principal contractor, which the defendants contend was the case. In either instance they owed the plaintiff the duty of not injuring his property by their neglect or wrongful acts. If they were the plaintiff's servants and their negligent actions caused injury to his building, they would be liable to him for the damage. (Bacon's Abridgement, Master and Servant, M.)

Smith, Master and Servant, 4th ed. 134, and cases cited; *White v. Phillipston*, 10 Met. 108; *Walcott v. Swampscott*, 1 Allen, 101; *Bickford v. Richards*, 154 Mass. 163.

If, then, dishes are broken or goods spoiled in process of manufacturing or damage is done to machinery through the negligence or misconduct of the employee, the employee is directly liable to the employer for the damage so caused. There seems to be no doubt that where it is made a part of the contract of employment that such damages shall be adjusted and taken out of the wages of the employee, the contract is lawful and may be enforced. *Gallagher v. Hathaway Mfg. Co.*, 172 Mass. 230.

There is a statute in regard to fines imposed on weavers which need not be discussed here, but I have found no statute in regard to fines imposed by employers in any other industry.

It is not to be understood that fines may be imposed arbitrarily or at the mere whim or caprice of the employer, but for a just cause and to a fair and just amount. In cases in which the contract of employment provides for it, the employer may, in my opinion, lawfully withhold money due the employee as wages to cover damages to the employer caused by the negligent or wrongful act of the employee.

CITIES AND TOWNS — PUBLIC DOMAIN — SALES.

Land acquired for a public domain under St. 1914, c. 564, cannot be sold or used for any purpose not specified in the act without the authority of the Legislature.

Land acquired by a city or town for a public domain, and placed under the management of the State Forester, must be maintained at the expense of such city or town.

To the
State Forester.
1915
January 8.

You ask whether under the provisions of section 1 of chapter 564 of the Acts of 1914 a town or city which has taken land for a public domain has the right to dispose of the same by sale or by making use of it for purposes other than the culture of forest trees; and second, in case the State Forester is given supervision of such public domain by the town, under section 2 of said chapter, whether the cost of control and management should be paid by the town or by the Forester's department.

The provisions of the first two sections of said act, so far as material, are as follows: —

SECTION 1. A town . . . or a city . . . may take or purchase land within their limits, which shall be a public domain, and may appropriate money and accept gifts of money and land therefor; . . . Such public domain shall be devoted to the culture of forest trees, or to the preservation of the water supply of such city or town and the title thereto shall vest in the city or town in which it lies.

SECTION 2. The city or town forester in each city or town . . . shall have the management and charge of all such public domain in that city or town . . . But a town . . . or a city . . . may place all such public domain within its limits under the general supervision and control of the state forester, who shall thereupon, upon notification thereof, make regulations for the care and use of such public domain and for the planting and cultivating of trees therein, and the city or town forester in such case and his keepers, under the supervision and direction of the state forester, shall be charged with the duty of enforcing all such regulations and of performing such labor therein as may be necessary for the care and maintenance thereof. . . .

Lands acquired under this act cannot, in my opinion, be sold by the town or used for any purpose other than the culture of forest trees or the preservation of the water supply of the city or town making the taking, without first obtaining per

mission or authority from the Legislature to make the sale or to change the use.

In response to your second question I have to say that the only difference in the regulation of such public domains as is contemplated by placing them under the supervision and control of the State Forester in accordance with the provisions of section 2, above quoted, is to secure the advantage of a trained forester over the planting and cultivation of trees. The public domains still remain the property of the city or town, and all expenses must be defrayed by the city or town even though supervision and control have been vested in the State Forester.

EMPLOYMENT OF LABOR — BUILDING LAWS.

A building containing two or more establishments, each employing less than ten persons but in the aggregate ten or more persons, comes within the provisions of St. 1913, c. 655, §§ 15 and 20.

You have requested my opinion upon the following question: —

Would a building containing two or more establishments, each employing less than ten persons but in the aggregate ten or more persons, come within the provisions of sections 15 and 20 of chapter 655 of the Acts of 1913?

To the Chief
of the Massa-
chusetts
District Police.
1915
January 12.

You have quoted from the two sections the language most directly relating to your inquiry, as follows: —

SECTION 15. No building which is designed to be used, in whole or in part, and no building in which alteration shall be made for the purpose of using it, or continuing its use, in whole or in part, as a public building, public or private institution, schoolhouse, church, theatre, special hall, public hall, miscellaneous hall, place of assemblage or place of public resort, or as a factory, workshop or mercantile or other establishment and to have accommodations for ten or more employees. . . .

SECTION 20. A building which is used, in whole or in part, as a public building, public or private institution, schoolhouse, church, theatre, special hall, public hall, miscellaneous hall, place of assemblage or place of public resort, and a building in which ten or more persons are employed in a factory, workshop, mercantile or other establishment. . . .

In each of the foregoing quotations from the statute the clause "a factory, workshop, mercantile or other establishment" might be regarded as indicating one shop or factory, etc., as the object at which the law is aimed, but the real purpose of the statute is the preservation of life and safety. The mischief aimed at is the crowding of people together, not necessarily in a single workshop but in a single building, under such circumstances as to make their condition one of danger in case of fire unless proper safeguards are adopted. To say that though there are a hundred workmen employed in a building, yet so long as not more than nine are employed in any one shop or factory the building is not subject to the inspection laws of the Commonwealth, would be to defeat the purpose of those laws in most important particulars. The clause above quoted was undoubtedly intended to, and does, relate to the building in which the factory, workshop or other place of employment may be located, and whenever ten or more persons are employed in a building, whether employed in one shop or factory or divided between two or more places within the building, that building is subject to the provisions of the two sections to which you refer.

LOAN AGENCIES — EXPENSES OF LOANS — INTEREST.

Under St. 1911, c. 727, actual expenses actually incurred by the lender may be collected of a debtor.

Although the addition of actual expenses to the interest collected by a loan agency from a debtor would make the cost to the borrower more than 3 per cent. per month, the transaction is lawful under St. 1911, c. 727.

To the
Supervisor of
Loan Agencies.
1915
January 18.

You have requested my opinion upon the following questions: —

(1) Under the Acts of 1911, chapter 727, and amendments thereto, can the supervisor of loan agencies require by regulation the borrower in negotiating a loan of less than \$300 to pay any expense incurred by the lender connected with the making of such loan?

(2) If such expense may be demanded by regulation can the amount of such expense, together with the interest placed on the loan, exceed the sum of 3 per cent. a month?

The authority of the Supervisor of Loan Agencies in regard to making regulations is contained in section 4 of chapter 727 of the Acts of 1911, which provides as follows:—

The supervisor shall, from time to time, establish regulations respecting the granting of licenses and the business carried on by the licensees, and by loan companies and associations established by special charter. He shall either personally, or by such assistants as he may designate, at least once a year, and oftener if he deems it necessary, investigate the affairs of such licensees, companies and associations and for that purpose shall have free access to the vaults, books and papers thereof, and shall ascertain the condition of the business, and whether it has been transacted in compliance with the provisions of law and the regulations made hereunder. The supervisor may, if he deems it expedient, cause an examination of the said books and business to be made by an accountant whom he may select, and the cost of any such examination shall be paid by the person, corporation or association whose books are so examined.

His authority to establish rates of interest rests in the provisions of section 7 of the same chapter, which provides as follows:—

The supervisor shall establish the rate of interest to be collected, and in fixing said rate shall have due regard to the amount of the loan and the nature of the security and the time for which the loan is made; but the rate shall, in no case, exceed three per cent a month; and no licensee or company or association to which this act applies, shall charge or receive upon any loan a greater rate of interest than that fixed by the supervisor.

The statute does not in terms declare that any expense charge shall or may be made by the lender and collected from the borrower; neither does the statute in terms prohibit such a charge.

Statutes of the character of the one under consideration are framed and enacted with relation to some existing business, and this is true of chapter 727 of the Acts of 1911. It is a matter of very common knowledge that for many years prior to the passage of this statute, in the business of making small loans it was the custom of individuals and concerns to make a charge against borrowers to cover alleged expenses, and while this statute does not contain express provision allowing such

charges, it does contain provisions in which mention is made of expenses, in such terms as, in my opinion, to raise a fair implication that it was the intention of the Legislature to leave the law in such condition that actual expenses incurred in making small loans might still be charged to and collected from the borrower.

Section 3 of the statute, as amended, contains the following provisions: —

In prosecutions under this act, the amount to be paid upon any loan of three hundred dollars or less for interest or expenses shall include all sums paid or to be paid by or on behalf of the borrower for interest, brokerage, recording fees, commissions, services, extension of loan, forbearance to enforce payment, and all other sums charged against or paid or to be paid by the borrower for making or securing or directly or indirectly relating to the loan, and shall include all such sums when paid by or on behalf of or charged against the borrower for or on account of making or securing the loan, directly or indirectly, to or by any person, partnership, corporation, or association other than the lender, if such payment or charge was known to the lender at the time of making the loan, or might have been ascertained by reasonable inquiry. Any person, partnership, corporation or association directly or indirectly engaging in the business of negotiating, arranging, aiding or assisting the borrower or lender in procuring or making loans of three hundred dollars or less for which the amount paid or to be paid for interest and expenses, including all amounts paid or to be paid to any other party therefor, exceeds in the aggregate an amount equivalent to twelve per cent per annum, whether such loans are actually made by such person, partnership, corporation or association, or by another party or parties, shall be deemed to be engaged in the business of making small loans and shall be subject to the provisions of this act.

Section 10, as amended, provides as follows: —

Any person, partnership, corporation or association violating any provision of this act or any regulation made hereunder or any rule or order made by the supervisor, shall be subject to a fine of not more than five hundred dollars, and the license may be suspended or revoked by the supervisor. Any loan upon which a greater rate of interest or expense is charged or received, than is allowed by this act and the regulations made hereunder, may be declared void by the supreme judicial court or the superior court in equity upon petition by the person to whom the loan was made.

The words "interest" and "expenses" as they occur in this chapter are evidently not intended to cover one and the same thing. The word "interest" is defined by authorities as the sum paid for the use of money, and as used in this chapter means nothing else. The word "expense" is defined as —

A laying out or expending; the disbursing of money; employment and consumption, as of time or labor. (Century Dictionary.)

As used in this statute the word means expense of this kind on the part of the lender in and about the making of a loan.

In construing statutes we are bound by the rule that —

Words and phrases shall be construed according to the common and approved usage of the language. (R. L., c. 8, § 4, cl. 3rd.)

The application of this rule to the construction of this statute makes it apparent that the words "interest" and "expenses" mean two different things. "Expenses" as the word is here used means actual expense,—expense that is actually and necessarily involved in the transaction of making the loan and is incurred and charged in good faith. It does not mean an arbitrary charge to be made whether actual expense is incurred or not, nor can this term be lawfully used to cover a charge and collection of a sum that is beyond the actual expense incurred or to cover a charge where there was no actual expense. Authority to make regulations does not confer authority to regulate in contravention of the meaning and intention of the statute itself.

If by your first question you intended to ask whether the supervisor of Loan Agencies has authority to impose upon the borrower of a sum less than three hundred dollars the payment of a sum of money as expense in making the loan, without regard to the question whether any expense has been incurred by the lender, it is my opinion that the supervisor has not that authority. It is my opinion that under the authority of section 4 above quoted the supervisor has no authority to require that any sum whatever be paid by the borrower as a

charge for the expense of making the loan, but has authority to regulate charges made by the lender for expenses. He has authority to prevent the abuse of the opportunity to make charges of that kind, and as it is not possible for him to examine the details and circumstances attendant upon the making of each and every loan, he may make regulations, not requiring the payment of a stated sum as expenses, but requiring that only actual expenses necessarily incurred in the making of the loan be charged by the lender.

In response to your second question, in cases where only expenses actually and necessarily incurred in making the loan are charged to the borrower, even though the expenses together with interest on the loan make the cost to the borrower more than 3 per cent. a month, the transaction is, in my opinion, lawful.

CHARITABLE CORPORATIONS — EDUCATIONAL INSTITUTIONS — RETURNS.

Although an institution for the education of the deaf may be essentially an educational institution, it may also be a charitable institution within the meaning of St. 1903, c. 402, and thereby be required to make an annual report to the State Board of Charity.

You have requested my opinion upon the following question: —

Under the provisions of chapter 402 of the Acts of 1903 is the Clarke School for the Deaf required to make an annual report to the State Board of Charity?

Chapter 402 of the Acts of 1903 provides as follows: —

A charitable corporation whose personal property is exempt from taxation under the provisions of clause three of section five of chapter twelve shall annually, on or before the first day of November, make to the state board of charity a written or printed report for its last financial year, showing its property, its receipts and expenditures, the whole number and the average number of its beneficiaries and such other information as the board may require.

Corporations whose personal property is exempt from taxation are designated in Revised Laws, chapter 12, section 5, clause 3rd, as follows:—

The personal property of literary, benevolent, charitable and scientific institutions and of temperance societies incorporated within this commonwealth, the real estate owned and occupied by them or their officers for the purposes for which they are incorporated, and real estate purchased by them with the purpose of removal thereto, until such removal, but not for more than two years after such purchase. Such real or personal property shall not be exempt if any of the income or profits of the business of such corporation is divided among the stockholders or members, or is used or appropriated for other than literary, educational, benevolent, charitable, scientific or religious purposes, nor shall it be exempt for any year in which such corporation wilfully omits to bring in to the assessors the list and statement required by section forty-one.

Chapter 125 of the Revised Laws deals with the formation of corporations for charitable and other purposes. Section 2 provides in part:—

Such corporation may be formed for any educational, charitable, benevolent or religious purpose; for the prosecution of any antiquarian, historical, literary, scientific, medical, artistic, monumental or musical purpose; for establishing and maintaining libraries; for supporting any missionary enterprise having for its object the dissemination of religious or educational instruction in foreign countries; for promoting temperance or morality in this commonwealth. . . .

In connection with the general subject I submit section 19 of chapter 39 of the Revised Laws, which reads as follows:—

The governor may, upon the request of the parents or guardians and with the approval of the board, send such deaf persons as he considers proper subjects for education, for a term not exceeding ten years, but, upon like request and with like approval, he may continue for a longer term the instruction of meritorious pupils recommended by the principal or other chief officer of the school of which they are members, to the American School, at Hartford, for the Deaf, in the state of Connecticut, to the Clarke School for the Deaf at Northampton, to the Horace Mann School at Boston, or to any other school for the deaf in the commonwealth, as the parents or guardians may prefer; and with the approval of the board he may, at the expense of the commonwealth, make such

provision for the care and education of children who are both deaf and blind as he may deem expedient. No distinction shall be made on account of the wealth or poverty of such children or their parents. No such pupil shall be withdrawn from such institutions or schools except with the consent of the authorities thereof or of the governor; and the expenses of the instruction and support of such pupils in such institutions or schools, including their necessary travelling expenses, whether daily or otherwise, shall be paid by the commonwealth; but the parents or guardians of such children may pay the whole or any part of such expense.

If there is any difficulty in reaching a prompt conclusion in this case it is due to the failure of the statutes to distinguish between purely charitable and purely educational institutions. In the broad sense an institution of learning may be said to be a charitable institution, and gifts to colleges or similar corporations are upheld as charitable gifts. This is true even though such institutions make no pretence of being charitable in the narrow sense, and though their doors open to admit rich and poor alike.

It is not confined to mere almsgiving or the relief of poverty and distress, but has a wider signification, which embraces the improvement and promotion of the happiness of man. (*Molly Varnum Chapter, D. A. R. v. Lowell*, 204 Mass. 487.)

Gifts to colleges and other educational institutions, for the advancement of learning or to aid necessitous students in procuring an education, are charitable even if the donee may derive revenue from other investments and from students who are able to pay. (*Mount Hermon Boys' School v. Gill*, 145 Mass. 139.)

In the case of *New England Sanitarium v. Stoneham*, 205 Mass. 335, at 341, the court says:—

It may be conceded that a trust for the exclusive benefit of the least wealthy of a well-to-do or prosperous class could not be sustained as a charity under the St. of 43 Eliz. c. 4. *Attorney-General v. Northumberland*, L. R. 7 Ch. D. 745. But the controlling purpose may be none the less charitable, even if those who need no pecuniary aid are either directly or indirectly benefited. A hospital established for the free treatment of poor patients may receive payments from rich persons who are permitted to avail themselves of its benefits. Every charity created for the

gratuitous treatment and relief of disease, or the physical infirmities of the indigent, or other purposes enumerated in this statute, or if not enumerated, which are held to come within its spirit and intendment, in a large sense helps and aids the community, without regard to the social rank or pecuniary condition of its members.

In the Century Dictionary a "charitable institution" is defined as, "A foundation for the relief of a certain class of persons by alms, education, or care, especially a hospital." Again: "A gift in trust for promoting the welfare of the community or of mankind at large, or some indefinite part of it, as an endowment for a public hospital, school, church or library. . . ."

Charity, in its legal sense, comprises four principal divisions, — trusts for the relief of poverty, trusts for the advancement of education, trusts for the advancement of religion, and trusts for other purposes beneficial to the community not falling under any of the preceding heads. (Bouvier's Law Dictionary, "Charitable Uses, Charities.")

Before the Statute of 43 Elizabeth, chapter 4, money given for the education of youth and the support of schools was recognized in England as given for a charitable use. Since this statute, educational institutions furnishing tuition free of charge or for a smaller sum than actual cost have been declared in a certain sense charitable trusts. Chief Justice Shaw said: —

That a gift designed to promote the public good, by the encouragement of learning, science and the useful arts, without any particular reference to the poor, is regarded as a charity, is settled by a series of judicial decisions, and regarded as the settled practice of a court of equity. (*American Academy of Arts and Sciences v. Harvard College*, 12 Gray, 582.)

Other courts have entertained similar views.

Nor has it ever been supposed in this country, that an institution established for the purposes of education is not a charity within the meaning of the law, because it sheds its blessings, like the dews of heaven, upon the rich as well as the poor. (*Price v. Maxwell*, 28 Pa. 23.)

It has been asserted, however, that there is a recognized distinction between strictly educational institutions and chari-

table institutions. In a minority opinion in *State v. Board of Control*, 85 Minn. 189, the court said:—

It is, however, now the settled law in all jurisdictions in which the statute of Elizabeth is in force that a gift or devise for the advancement of education, even if it be made without reference to the poor, is a charity, within the law of charitable uses. It was necessary for courts of equity to so define "charity" in order to sustain such gifts or devises, and not permit them to lapse. The cause justified the definition. But the broad, common-sense, and popular distinction between "education" and "charity" has always been recognized by the courts of this country, except in cases involving the doctrine of charitable uses, or the taxation of property held for such uses. It is true that the statute of Elizabeth expressly declared that the maintenance of schools of learning and free schools was a charity; but the fact is not significant, for at that time there were not, and never had been, any free schools in England, except those maintained by the charity of the church or other organizations. It was not until after the commencement of the reign of Queen Victoria that the government began seriously to recognize that it was any part of the duty of the State to provide for the education of all of her citizens. Prior to that time the cause of education was in fact, as well as in law, a charity.

In the same opinion the justice said:—

I cannot believe that the Legislature, in adopting the title of the statute in question, intended to reject the usual and popular meaning of the word "charitable," and substitute therefor the ancient and moss-covered definition of "charity" which the chancery court invented centuries ago for the purpose of sustaining charitable uses, and thereby classify the State normal schools and the State university as charitable institutions. . . . Now, as conclusively demonstrated, . . . the constitutional, legislative, executive, and popular classification of such institutions is, and always has been, in this State, based upon the popular and common-sense distinction between education and charity. In such classification our institutions of learning are classified by themselves as "educational institutions," and our institutions for defectives are also separately classified as "charitable institutions."

While the court in the above case divided on the main point in issue, there seems to have been no division on the point involved in the question here. On page 192 the minority opinion further states:—

We need not cite definitions from the lexicographers to show what, in the present age, are generally understood to be "charitable" and what "educational" institutions, but it may be stated that the former are usually defined as founded "for the relief of certain classes of persons by alms, education, or care; especially a hospital;" as "institutions established for the help of the needy;" as "pertaining to charity; springing from or intended for charity;" while the latter are institutions founded for the express purpose of instructing the youth of our land along mental and physical lines, such instruction not being granted as a bounty, but as of right.

If we were compelled solely to rely upon these definitions, they would be quite sufficient to justify the assertion that our educational institutions are not charitable, within any of the definitions, but the paramount question here is an entirely different one. We are called upon to ascertain what should be understood when these words are used in the statutory jurisprudence of this State; and, as a consequence, what would their use by the Legislature suggest or convey to the reader of such a title. To what institutions have these terms been applied, and how have they been used? An examination for this purpose should lead to but one conclusion, in my judgment, namely, that the words "charitable institutions" mean institutions, supported in whole or in part at the expense of the State, for the relief of the indigent, the defective, and the unfortunate, — institutions in which the State dispenses and administers charity to those dependent upon it, and the inmates of which (victims of misfortune) are the beneficiaries and recipients of charity.

In *People v. New York*, 161 N. Y. 233, it was contended that as the defendant corporation had been given legal capacity to take and administer gifts and bequests under the Statute of 43 Elizabeth, and under the general rules applicable to trusts, it was a charitable institution. To this claim the court answered: —

It is said that this corporation, in order to promote the objects of its incorporation, has been given legal capacity to take and administer gifts and bequests that would be called charitable under the statute of Elizabeth and under general rules of law applicable to trusts, and all that is quite true. But it is an error to conclude that a corporation must necessarily be of a charitable nature because it has capacity to take and administer such gifts. A very large class of corporations may do that, without affording the slightest ground for an argument that they are or must be charitable institutions or corporations. Colleges, academies

and nearly all institutions of learning or of a literary character, and even cities, villages and other municipal corporations, may take and administer such gifts; but that fact cannot in the least affect their true character, or convert them into charitable institutions. Again, it was said: "It is only necessary to add that if we were to hold that every corporation with capacity to take and administer such a gift or bequest is a charitable institution within the meaning of the Constitution and the statute, we would have to include a great number of corporations whose objects are entirely foreign to any work of charity, even in the broadest sense. Capacity to take a bequest proceeding from charitable motives is no real test of the class to which the corporation taking it belongs."

A similar question to the one at issue arose in *People v. Fitch*, 154 N. Y. 14. In this case it was decided that an institution for the blind was such a charitable corporation as would come under the supervision of the State Board of Charities. At page 26 the court said:—

The relator is, doubtless, to an extent, an educational institution. But that fact alone does not justify the conclusion that it is not a charitable institution within the meaning and intent of the Constitution and statutes. An institution may be in a sense educational and at the same time be wholly or partly charitable, as the education and maintenance of indigent pupils, while being educated, may be the subject of charity as well as support alone. An institution may be both educational and charitable, and if so, it falls within the provisions of the Constitution and statutes, as it is to be observed that the provisions are that the board of charities shall visit and inspect all institutions which are of a charitable character or design, and, hence, to fall within that description, it is not necessary that the institution shall be wholly charitable. It need only be an institution which is wholly or partly charitable in its character and purpose.

Nor is the fact that institutions for the instruction of the blind are made subject to the visitation of the superintendent of public instruction controlling in determining this question. It may be conceded that this institution is partially educational and subject to the visitation of the superintendent of public instruction, and yet by no means follow that it is not an institution which is charitable in its character and purpose, and, therefore, also subject to the visitation of the board of charities, as the Constitution provides that the visitation by the board of charities is not exclusive of any visitation then provided by law, which would clearly include the visitation by the superintendent of public instruction.

Another case in point is that of *Asylum v. Phoenix Bank*, 4 Conn. 172. Here a corporation had for its sole object the education and instruction of the deaf and dumb, which supported and instructed indigent persons of that class gratuitously, received a pecuniary compensation from pupils of ability to make it, derived its means of dispensing charity from the donations of individuals and of the public, and applied its funds exclusively to the general object of its institution. The court said, at pages 177-8:—

The American Asylum may, with the strictest propriety, be defined, *an incorporated school for charitable purposes*. It is a *school*, which is a generic term, denoting an institution for instruction or education; and from the nature of its object, is a private incorporation. Its objects and operations are all of a private character; and the donations of States to aid in effectuating them, do not, in the minutest degree, change its nature. The institution is exclusively “for charitable purposes;” its sole object being to pour instruction into the minds of the deaf and dumb; to elevate them from the lowest degradation of intellect to the dignity of intelligent, and fit them to become moral and religious beings; to open their blind eyes, and unstop their deaf ears; and to accomplish this, through the means of funds, derived from the gratuities of the benevolent. A purpose so honorable and noble, and free from the dross of self-interest, brings the American Asylum peculiarly within the spirit, as it is obviously within the letter, of the law, which authorizes a compulsory subscription of the stock of the Phoenix Bank. The Asylum, in no sense of the expression, is a money-making institution. All its funds are necessarily applicable to the charitable object of educating the deaf and dumb; and this is done gratuitously, except so far as the power of doing is enlarged, by the sums paid for instruction, by the rich and able. By this operation, the funds of the institution are not absorbed, but augmented; the charitable object of the Asylum is not diminished, but promoted; and the nature of it is not changed, but pursued.

It is my opinion that the Clarke School for the Deaf is a charitable institution within the meaning of chapter 402 of the Acts of 1903, and that a report should be made annually to the State Board of Charity. The Clarke School was incorporated for the purpose of benefiting a class of defectives which is most seriously handicapped in its struggle for existence and in its participation in the blessings of life. Such was

the noble end of the founders of the school, and these purposes and aims have never been lost sight of by those having the care and education of this weaker portion of our society. To suggest that such an institution is not charitable would seem to cast a reflection on the school and all those interested in its achievements. That it is also an educational institution in no way lessens its charitable nature. There would seem to be no reason why many institutions may not be both charitable and educational, and the fact that this school, by reason of its educational features, submits a report to the State Board of Education is no reason in itself why it ought not to report likewise to the State Board of Charity.

It might also be argued that the Legislature intended to give the State Board of Charity supervision over all institutions which exercise a control over the weaker elements of society, as a guard against the abuse of the confidence reposed in them by the contributing public and as a protection to the unfortunates intrusted to their care, the latter being obviously handicapped in any effort to protect themselves.

OPINIONS

OF

HENRY C. ATTWILL, ATTORNEY-GENERAL.

DIRECTORS OF THE PORT OF BOSTON — POWERS — CONSTRUCTION OF DRY DOCK.

St. 1911, c. 748, § 5, providing that the Directors of the Port of Boston "may lay out and build . . . such piers, with buildings and appurtenances, docks, highways, waterways, railroad connections, storage yards and public warehouses as, in the opinion of the directors, may be desirable," did not authorize them to enter into contracts for the construction of a dry dock substantially as described in the report of the Directors for the year ending Nov. 30, 1913, the final decision as to whether such a dry dock should be built having been reserved to itself by the General Court.

You have requested my opinion as to "whether or not, under the terms of chapter 748 of the Acts of 1911, or any acts in amendment thereof or in addition thereto, the Directors of the Port of Boston are authorized to enter into contracts for the construction of a dry dock substantially as described in the report of said Directors for the year ending Nov. 30, 1913."

To the
Directors of
the Port of
Boston.
1915
January 28.

None of the acts amendatory of chapter 748 of the Acts of 1911 have increased the powers of the Directors of the Port in that respect.

The power to construct a dry dock like that described must be found, if at all, in the provisions of section 5 of the act of 1911, the pertinent portion of which is as follows: —

With the consent of the governor and council, the directors . . . may lay out and build . . . such piers, with buildings and appurtenances, docks, highways, waterways, railroad connections, storage yards and public warehouses as, in the opinion of the directors, may be desirable. . . .

It may be suggested that a dry dock is but one kind of a dock, and that the opinion of the Directors as to the desirability

of that particular type is conclusive. It is true that in some cases arising under different circumstances and in different localities a dry dock has been regarded as but one of many types, but primarily, in this country, I believe it has a more limited sense.

Bouvier defines "dock" as "the space between two wharves."

A dock is defined by philologists, according to the American use of the term, to be "the space between wharves." *City of Boston v. Lecraw*, 17 How. at 434.

In Webster's Dictionary we find the following:—

An artificial basin or inclosure in connection with a harbor, for the reception of vessels; the slip or waterway extending between two piers or projecting wharves or cut into the land, for the reception of ships.

The Century Dictionary says:—

An inclosed water-space in which a ship floats while being loaded or unloaded, as the space between two wharves or piers; by extension, any space or structure in or upon which a ship may be berthed or held for loading, unloading, repairing or safe-keeping.

A dry dock such as is described is a decided extension of the idea of an inclosed water-space in which a ship floats while being loaded or unloaded. The principal use of a dry dock is for the repairing or overhauling of ships, for the efficient performance of which "shops and other buildings" are "necessary." If the difference be considered as one of degree, it is so great that, in my opinion, in this country it has become one of kind, and in its primary meaning a dry dock is considered more as a repair shop than as a dock.

Under the provisions of section 5 the Directors of the Port are restricted in the acquiring of real property and rights and easements therein, to that necessary for the purpose of constructing, or securing the constructing or utilizing of, piers and, in connection therewith, highways, waterways, railroad connections, storage yards and sites for warehouses and industrial establishments. The main object of the first part of this

section is to provide for the securing of land upon which to build piers, and the provisions for the constructing and securing the constructing or utilization of highways, waterways, railroad connections, storage yards and sites for warehouses and industrial establishments are incidental to the main object and for the purpose of making the piers convenient and available for use. Docks necessarily would be created by the construction of piers.

No provision is made for the taking or acquiring of land or other rights for docks. If the Legislature had in mind the granting of the right to build a structure which would require about one-third of the total appropriation of \$9,000,000 for its construction, it seems probable that it would have given as wide a latitude in selecting the most advantageous site heretofore as it did with respect to piers.

Moreover, under the provisions of the latter part of section 11 the Directors of the Port are authorized to lay out and build such piers with buildings and appurtenances as may be desirable, and no provision is made for appurtenances in connection with docks. A dry dock without appurtenances for its operation is useless.

It would appear, therefore, that the docks referred to in the latter part of the section are those docks only that are incident to or connected with the use of piers or like structures which the Directors of the Port are authorized to construct.

While the foregoing furnish reasons for doubting whether in using the word "docks" the Legislature intended to include such a gigantic construction work as is described, section 12 of the act deals particularly with the matter of a dry dock. It provides:—

It shall be the duty of the directors forthwith to make, and, so far as may be practicable, to put into execution, comprehensive plans providing on the lands now owned or hereafter acquired by the commonwealth the area described in section four of this act, adequate piers, capable of accommodating the largest vessels, and in connection with such piers suitable highways, waterways, railroad connections and storage yards, and sites for warehouses and industrial establishments. The directors

shall report to the next general court, on or before the fifteenth day of January, nineteen hundred and twelve, all necessary plans and estimates of cost for the construction of a dry dock equipped with modern facilities and appliances, sufficient in size for the accommodation of any modern ocean steamship.

The effect to be given to this section must be determined with reference to what has gone before.

In the report of the Board of Harbor and Land Commissioners for the year 1904 the subject of dry docks was extensively dealt with and the conclusion reached that the building of one was not advisable. The joint commission originally appointed under chapter 108 of the Resolves of 1907 submitted its final report in 1911 to the Legislature of that year. It was printed as House Document No. 1550. On page 25 is found the conclusion of this commission:—

In view of these facts the Commonwealth of Massachusetts would not be warranted in constructing, owning and operating a dry dock for the use of docking merchant ships; to do so would be a waste of the public funds to satisfy a mistaken sentiment.

It therefore appears that the Legislature of 1911, when considering the bill which ultimately became chapter 748 of that year, had before it this emphatic condemnation of the proposition of building a dry dock. In fact, the portions of this report immediately preceding that mentioned were referred to the same committee (metropolitan affairs) as that portion of the Governor's address concerning transportation which related to the development of the port of Boston, and a bill for such development. It was as a result of the reference of all three of these matters that the bill "Relative to the development of the port of Boston" was reported.

The particular portion of the above-mentioned report of the joint commission which dealt with the matter of a dry dock was referred to the committee on harbors and public lands, which reported "no legislation necessary." This report was accepted by both branches of the Legislature.

While the question is not free from doubt, I am of the opinion that the events preceding the passage of this act, taken in connection with the act itself, indicate that the Legislature intended to reserve to itself the final decision as to whether there should be built a dry dock, equipped with modern facilities and appliances, such as is described in the report of the Directors of the Port for the year ending Nov. 30, 1913; and that without further authorization by the Legislature the Directors of the Port are not warranted in entering into contracts for the construction of such a dry dock.

PILOTS — COASTWISE STEAM VESSELS — REQUIREMENT OF
FEDERAL LICENSE — EFFECT ON STATE STATUTE.

R. L., c. 67, §§ 25 and 28, so far as they relate to coastwise steam vessels, are inconsistent with and annulled by U. S. Rev. Stats., §§ 8153 and 8206, and, therefore, a Boston pilot must in addition to his State commission carry a Federal license in order legally to pilot coastwise steam vessels not sailing under register.

Answering your favor of the 1st inst., requesting my opinion upon the question "whether a Boston pilot should in addition to his State commission carry a Federal license," I beg to advise you that in order legally to pilot coastwise steam vessels not sailing under register a Boston pilot must carry a Federal license.

To the Pilot
Commissioners.
1915
February 11.

You state that by the terms of their State commissions Boston pilots are required to serve on any vessel requiring their services. This is so by virtue of the provisions of R. L., c. 67, § 25, directing a pilot "to take charge, within the limits of his commission, of any vessels, not exempt from compulsory pilotage by section twenty-eight, and of vessels not bound from one port to another within the commonwealth, unless they are engaged in the completion of a voyage from a port out of the commonwealth." Among the exceptions included in section 28 are "steam vessels regulated by the laws of the United States and carrying a pilot commissioned by United States commissioners" and "vessels regularly employed in the coasting trade," but

as to these exempted vessels, the pilot is required, by a later provision of section 28, to serve if requested.

The Federal statutes material to this opinion are United States Compiled Statutes (1913), sections 7981, 8153 and 8206.

Section 7981 (R. S. § 4235) is as follows:—

Until further provision is made by Congress, all pilots in the bays, inlets, rivers, harbors, and ports of the United States shall continue to be regulated in conformity with the existing laws of the States respectively wherein such pilots may be, or with such laws as the States may respectively enact for the purpose. (Act Aug. 7, 1789, c. 9.)

Section 8153 (R. S. § 4401) is as follows:—

All coastwise sea-going vessels, and vessels navigating the great lakes, shall be subject to the navigation laws of the United States, when navigating within the jurisdiction thereof; and all vessels, propelled in whole or in part by steam, and navigating as aforesaid, shall be subject to all the rules and regulations established in pursuance of law for the government of steam-vessels in passing, as provided by this Title; and every coastwise sea-going steam-vessel subject to the navigation laws of the United States, and to the rules and regulations aforesaid, not sailing under register, shall, when under way, except on the high seas, be under the control and direction of pilots licensed by the inspectors of steam-boats. (Act Feb. 28, 1871.)

Section 8206 (R. S. § 4444) is as follows:—

No State or municipal government shall impose upon pilots of steam-vessels any obligation to procure a State or other license in addition to that issued by the United States, or any other regulation which will impede such pilots in the performance of the duties required by this Title; nor shall any pilot-charges be levied by any such authority upon any steamer piloted as provided by this Title; and in no case shall the fees charged for the pilotage of any steam-vessel exceed the customary or legally established rates in the State where the same is performed. Nothing in this Title shall be construed to annul or affect any regulation established by the laws of any State, requiring vessels entering or leaving a port in any such State, other than coastwise steam-vessels, to take a pilot duly licensed or authorized by the laws of such State or of a State situate upon the waters of such State. (Act Feb. 28, 1871.)

Under Article I., section VIII., clause 3 of the Constitution of the United States, Congress has power “to regulate

commerce with foreign nations, and among the several states, etc." It has been established by decisions of the United States Supreme Court that this authorizes the regulation of navigation, including therein regulation of the qualifications of pilots, the modes and times of offering and rendering their services, and the responsibilities which shall rest upon them. *Cooley v. Board of Wardens of Port of Philadelphia*, 12 How. 144.

This power is not limited to navigation on the high seas but extends to every part of the voyage from wharf to wharf. The subject covered by this clause of the Constitution is not one the exclusive control over which resides in Congress. It is the exercise of its power to regulate commerce among the several States which is incompatible with the exercise of the same power by the States. In the absence, therefore, of congressional regulation, the provisions of our Revised Laws, chapter 67, sections 25 and 28, are in full force and effect.

So far, therefore, as the statutes or regulations of the Commonwealth conflict with the acts of Congress above quoted, they are null and void. Section 8153 requires that pilots licensed by United States inspectors of steamboats shall control every coastwise sea-going steam vessel not sailing under register. The question of the effect of this regulation, among others, upon existing State regulations is specifically treated in section 8206, wherein it is stated that "Nothing in this title shall be construed to annul or affect any regulation established by the laws of any State, requiring vessels entering or leaving a port in any such State, *other than coastwise steam-vessels*, to take a pilot duly licensed or authorized by the laws of such State. . . ." As to coastwise steam vessels not sailing under register, therefore, Congress has expressly said that it annuls any State regulation requiring pilot service thereon. It follows that the provisions of R. L., c. 67, §§ 25 and 28, cannot protect a pilot serving by request or otherwise "coastwise steam vessels not sailing under register," and

in order legally to pilot such vessels the pilot must hold a license issued by the United States inspectors of steamboats.

NEW YORK, NEW HAVEN & HARTFORD RAILROAD COMPANY —
CONTROL OF BOSTON & MAINE RAILROAD THROUGH
BOSTON RAILROAD HOLDING COMPANY — EFFECT OF COM-
PLIANCE WITH DECREE OF UNITED STATES DISTRICT COURT
— ST. 1914, c. 766, NOT ACCEPTED.

History of acquisition of control of the Boston & Maine Railroad by the New York, New Haven & Hartford Railroad Company through the formation of the Boston Railroad Holding Company, with a statement of charter powers of the latter corporation.

St. 1914, c. 766, has not been complied with by the New York, New Haven & Hartford Railroad Company or by the persons named as liquidators in Appendix A annexed to that statute.

The terms of Appendix A have not been substantially incorporated in the decree entered in the United States District Court for the Southern District of New York on Oct. 17, 1914, by consent of the parties, in the suit brought by the United States against the New York, New Haven & Hartford Railroad Company, the Boston Railroad Holding Company and others, alleging an illegal combination in violation of the Sherman act.

St. 1914, c. 766, § 1, did not authorize the Governor to modify the provisions of sections 3, 4 and 5 of that statute creating an option in the Commonwealth to take or purchase shares of stock in the Boston & Maine Railroad owned by the Boston Railroad Holding Company. Appendix A could not, therefore, be modified to conform to this decree.

Unless the trustees appointed by the decree referred to are hereafter directed by the United States District Court to sell the shares of the Boston & Maine Railroad owned by the Boston Railroad Holding Company, subject to the condition stated in St. 1914, c. 766, a compliance with that act is inconsistent with a compliance with the decree.

The mere transfer by the New York, New Haven & Hartford Railroad Company of the shares of the Boston Railroad Holding Company owned by it to the trustees named in the decree referred to in accordance with the order of the court was not a violation of the laws of this Commonwealth. If hereafter this stock is sold by these trustees by order of the United States District Court without the consent of the General Court, and the purchaser acquires a good title, the terms of the act creating the Boston Railroad Holding Company will then be violated.

The transfer by the New York, New Haven & Hartford Railroad Company of the shares of the Boston Railroad Holding Company to the trustees named in the decree referred to in accordance with the order of the United States District Court was not an acceptance by it of the provisions of St. 1914, c. 766.

To the House
of Repres-
entatives,
1915.
February 23.

I have the honor to acknowledge the receipt of an order passed by the House of Representatives on February 11 in the following form: —

Ordered, That the following questions of law be submitted to the Attorney-General, with the request that his opinion be returned to the House of Representatives at his earliest convenience: —

1. Whether the provisions of chapter 766 of the Acts of the year 1914, to which there is an appendix entitled "Appendix A," have been complied with by the New York, New Haven & Hartford Railroad Company and the persons named therein as liquidators.

2. Whether the terms of said Appendix A have been substantially incorporated in a decree of the United States District Court of the Southern District of New York.

3. Whether under the provisions of said act said agreement set forth in said Appendix A could have been modified or amended so as to conform in all respects with said decree.

4. Whether a compliance with said act is in any way inconsistent with compliance with said decree.

5. Whether the transfer of the shares of the Boston Railroad Holding Company or any of them to the said persons named as liquidators in a manner not contemplated in said act and without the execution of the agreement set forth in Appendix A or any amendment thereof is a violation of the laws of the Commonwealth.

6. Whether the transfer of said shares to said persons, though not in accordance with the provisions of said act, is in effect an acceptance of all the provisions of said act, and particularly of section 3 of said act, or whether by the transfer of said shares in a manner not contemplated by said act the provisions of said section have been evaded.

In order adequately to answer these inquiries it is necessary to recall some incidents in recent railroad history, most of them matters of public knowledge. I shall refer to the New York, New Haven & Hartford Railroad Company as the New Haven Company, to the Boston Railroad Holding Company as the Holding Company, and to the Boston & Maine Railroad as the Maine Company.

On May 8, 1908, the Supreme Judicial Court decided (*Attorney-General v. New York, New Haven & Hartford Railroad Company*, 198 Mass. 413) that the New Haven Company was prohibited by the statutes of this Commonwealth from directly or indirectly subscribing for, taking or holding the stocks or bonds of any other corporation without the authority of the General Court. The stocks involved in that decision were shares in certain street railway corporations located in central and western Massachusetts. The decree in that case was finally affirmed on March 1, 1909. Prior to this decision the

New Haven Company had acquired and was holding a large number of shares of the Maine Company. About this time, and apparently in view of the decision just referred to, these shares were transferred by the New Haven Company to a corporation formed under the laws of another State.

On April 20, 1909, His Excellency Governor Draper called the attention of the General Court to this situation, and suggested the advisability of creating a corporation which, under prescribed limitations, should have the right to purchase and hold shares of stock in the Maine Company. (See Acts and Resolves, 1909, p. 965.) The result was the statute of 1909, chapter 519, incorporating the Holding Company.

Section 1 of that act defined the general charter powers of that corporation in the following language:—

. . . for the sole purpose of acquiring and holding the whole or any part of the capital stock, bonds and other evidences of indebtedness of the Boston and Maine Railroad, and of voting upon all certificates of stock so acquired and held, and of receiving and collecting dividends and interest upon said stock, bonds and other evidences of indebtedness.

Section 3 provided, in part:—

The stock of the Boston and Maine Railroad which may be acquired by said Boston Railroad Holding Company shall not be sold by it without express authority from the legislature; . . .

Section 4 authorized any railroad incorporated under the laws of the Commonwealth at that date to guarantee dividends and interest upon the stocks and bonds of the Holding Company, and to acquire and hold such stocks and bonds. It further provided:—

Any railroad corporation acquiring said stock as hereinbefore provided shall not thereafter sell the same without the express authority of the legislature. The commonwealth may at any time by act of the legislature, upon one year's notice, take or acquire by purchase or otherwise the stock, bonds, notes and other evidences of indebtedness issued by the said Boston Railroad Holding Company.

The section then went on to provide the conditions under which this taking should be made and the manner in which compensation for the property taken should be determined.

Acts of 1910, chapter 639, authorized the Holding Company to issue preferred stock which should have no voting power. It expressly made this preferred stock a lien upon all the stock of the Maine Company at any time held by the Holding Company. It provided that any railroad owning common stock of the Holding Company might acquire, hold, own and sell any of its preferred stock.

Under the authority of these statutes the Holding Company was formed. It acquired the stock of the Maine Company which had been transferred by the New Haven Company to a foreign corporation as hereinbefore stated, and, also, as I am informed, certain of the stock of the Maine Company held by various individuals. The New Haven Company acquired, and up to the date of the decree referred to in your order was holding, 31,065 shares of the common stock and 244,939 shares of the preferred stock of the Holding Company. This was all the common stock and all but approximately 28,000 of the preferred stock.

Subsequent to the perfection of this arrangement it was claimed by the Attorney-General of the United States that the relations between the New Haven Company and its associated corporations, including the Holding Company, were a violation of the Sherman anti-trust law. It was expressly claimed that the control of the Maine Company by the New Haven Company through the instrumentality of the Holding Company was a part of an illegal combination in restraint of trade and commerce among the States. The New Haven Company denied that it was violating the law, but, owing to its financial condition, felt that it was unwise for it to engage in a long and expensive contest with the United States. Accordingly, numerous conferences were held between the representatives of the railroad and the Attorney-General of the United States for the purpose of bringing about, by agreement, dissolution of the alleged illegal combinations. When an

agreement had been nearly, if not quite, reached, though not executed, the matter was called to the attention of the General Court by His Excellency Governor Walsh, and thereafter chapter 766 of the Acts of 1914 was passed, and approved on July 7, 1914.

Thereafter, as I am informed, the directors of the New Haven Company by vote expressly declined to accept the provisions of this act. So far as I am informed no agreement in the form of Appendix A, annexed thereto, was ever executed by the New Haven Company.

On July 23, 1914, a bill in equity was brought by the Attorney-General of the United States in the United States District Court for the Southern District of New York, in the name of the United States, against the New Haven Company, the Holding Company and various other defendants, alleging that the defendants were parties to combinations in violation of the Sherman act, and seeking a dissolution of these combinations by decree of court. Thereafter further negotiations were held between the parties, and finally, on Oct. 17, 1914, by written consent of the defendants, the decree referred to in your order was entered for the purpose of bringing about a dissolution of the alleged illegal combinations. So far as appears from the records of that court this formal assent is the only written agreement made by the parties in connection with the entry of this decree. I submit herewith an attested copy of the decree. I am informed that the New Haven Company has duly transferred to the trustees named in the first section of the decree the stock of the Holding Company therein described.

Before proceeding to answer your questions, it is important to note an essential and distinguishing feature of chapter 766 of the Acts of 1914. Section 3 provides that upon the acceptance of that act the Holding Company shall forthwith cause to be printed on each certificate of stock of the Maine Company held by it the words, "This stock may at any time be taken or purchased by the Commonwealth of Massachusetts at the fair value thereof in accordance with law." The statute directs that the same words be printed on all certificates there-

after issued by the Maine Company to future transferees representing any stock held by the Holding Company, and also upon all certificates for new issues. Section 5 then provides that the Commonwealth may at any time, by act of the General Court, take or acquire any or all stock of the Maine Company so printed, held by any person. The method of determining the compensation to be paid is set forth. The obvious effect and purpose of these provisions if accepted and complied with were to give the Commonwealth an option to take or purchase this stock at any time from any holder of it. The statute (section 2) authorized the Holding Company to sell its Boston and Maine stock only upon the condition that it be subject to this option to the Commonwealth to acquire it from the purchasers or their subsequent transferees.

With this review of the situation, I proceed to answer your questions.

1. I am of opinion that chapter 766 of the Acts of 1914 has not been complied with by the New Haven Company or by the persons named as liquidators in Appendix A.

While the decree entered in the United States District Court followed Appendix A in most respects, as I shall later point out, there are certain important differences between the decree and Appendix A. Then, the decree in no way attempts to preserve or create any option to the Commonwealth to acquire the Maine Company stock owned by the Holding Company from subsequent purchasers in the event that a sale of it by the trustees is thereafter ordered by the court. Section 7 of chapter 766 provides that a transfer of shares of the Holding Company by the New Haven Company, to be held in accordance with the terms of Appendix A, shall be deemed an acceptance of the act by the New Haven Company. Neither Appendix A nor any similar agreement has been executed by the New Haven Company. Though the general scheme and most of the terms of Appendix A have been incorporated in the decree entered by agreement, no provision has been made for creating or enforcing the proposed option to the Commonwealth, which was the distinguishing feature of chapter 766.

In my opinion the consent of the New Haven Company and the liquidators to the decree was not intended to be, and did not in fact constitute, an acceptance by them of chapter 766 of the Acts of 1914.

2. As I have already stated, a very large part of Appendix A was incorporated in the decree. I have carefully compared the terms of the two documents. While there are some differences of order and phraseology, for the most part made necessary by the natural differences between an agreement and a decree, I find but two substantial differences.

By Section First, paragraph F of the decree, the trustees are authorized to exchange the shares of the Maine Company held by the Holding Company for shares or securities in another corporation in case "a reorganization of the Maine Company *with or without its leased lines, or any of them*, shall be proposed." Paragraph 7 of Appendix A gives a similar authority to exchange only in case "a reorganization of the Maine Company *and its leased lines* shall be proposed." Thus, the authority to exchange in case of reorganization is considerably broader under the decree than that contemplated by Appendix A.

The main point of difference, however, is to be found in the provisions for the sale of the Maine Company stock held by the Holding Company. Paragraph 2 of Appendix A is as follows:—

As early as may be the liquidators shall make proper arrangements to protect the rights of the Holding Company's preferred stockholders, and after such arrangements have been made shall exercise their powers so that there shall be a sale at such time or times, together or in parcels, and by public auction or by private contract, of all the shares of the Maine Company belonging to the Holding Company free from the statutory lien of the preferred shares hereby transferred, and of any other property belonging to it whenever in their judgment such sale or sales can be made to the best advantage.

The counterpart of this provision in the decree (paragraph B of Section First) is as follows:—

As early as may be the trustees shall make proper arrangements to protect the rights of preferred stockholders of the Holding Company,

after which, but not until further order of the court, they shall exercise their powers so that there shall be a sale or sales, together or in parcels, by public auction or private contract, of all the shares of the Maine Company owned by the Holding Company, free from the statutory lien of the preferred shares of the Holding Company hereby directed to be transferred; and also a sale or sales of any other property owned by the Holding Company, whenever in their judgment that can be done to the best advantage.

No order directing the sale of such shares of the Maine Company or any portion of them or fixing the terms or conditions thereof shall be made by the court until after July 1, 1915, unless the New Haven Company shall in writing consent thereto. If no such order has been made before July 1, 1915, the court on application of any party and after a hearing at which the Commonwealth of Massachusetts shall be invited to appear, shall direct the sale and fix the terms and conditions thereof.

Thus it is to be seen that while Appendix A authorized and directed a sale of the Maine Company stock by the liquidators without further authority, the decree provides merely that the trustees shall arrange and prepare for a sale, but that this sale shall not be held "until further order of the court." No sale is to be ordered before July 1, 1915, without the written consent of the New Haven Company. On any application for authority to sell after that date the Commonwealth is to be given an opportunity to be heard, and the court is then to direct the sale upon such terms and conditions as it may fix. Thus the entire matter of the terms and conditions of the sale of the Maine Company stock is reserved for the future determination of the court.

As I view it, this difference in the power of sale granted by the decree from that stated in Appendix A is a substantial one. I must answer your second question in the negative.

3. I understand your third question to refer to the last clause of section 1 of chapter 766, namely, "said stock to be held and disposed of by said liquidators in accordance with the terms of such written instrument or any written modification thereof hereafter approved by the attorney-general of the United States and by the governor of the commonwealth."

I interpret this clause to mean that after the New Haven Company has transferred the stock of the Holding Company

to the liquidators under a written instrument in the form of Appendix A, that instrument may subsequently be modified, so far as the powers of the liquidators to hold and dispose of the stock are concerned, by a written instrument entered into between the parties and approved by the Attorney-General of the United States and the Governor of this Commonwealth. I do not understand that this clause refers to substantial changes in Appendix A before it is executed and the statute thus accepted by the New Haven Company and the Holding Company. In any event, I am of opinion that chapter 766 gave no authority to the Governor to modify the conditions imposed by sections 3, 4 and 5 of that act creating an option in the Commonwealth as already described.

4. If, on an application made under paragraph B of Section First of the decree, the United States District Court should direct the trustees to sell the Maine Company stock upon the conditions imposed by chapter 766, a compliance with that act would not be inconsistent with a compliance with the decree. Unless thus directed by future orders of the United States District Court, the trustees cannot comply with terms or conditions contained in chapter 766 or the appendix thereto, and not expressly made a part of the decree.

5. Section 4 of chapter 519 of the Acts of 1909 provides:—

Any railroad corporation acquiring said stock as hereinbefore provided shall not thereafter sell the same without the express authority of the legislature.

This refers only to the common stock. By chapter 639 of the Acts of 1910 express authority is given to a railroad owning preferred stock to sell the same. Your fifth question, therefore, can relate only to the 31,065 shares of common stock transferred under the decree.

It is to be noted that no sale of this common stock has taken place and that none is contemplated by the decree. The legal title has merely been transferred to trustees to hold for the ultimate benefit of the New Haven Company, its

owners. The trustees are to liquidate the affairs of the Holding Company, and then are to bring about its dissolution and a distribution of its assets.

It has been judicially determined by this decree that the holding of this stock by the New Haven Company, and the consequent control by it of the Maine Company, was a violation of the laws of the United States. This determination is binding upon the New Haven Company, though not, of course, upon the Commonwealth. In order to dissolve this combination the New Haven Company has been in effect ordered to liquidate and dissolve the Holding Company. This is to be brought about by independent trustees who are to hold the Holding Company stock for the financial benefit of the New Haven Company as its owner, but in such a manner that the laws of the United States shall not be violated.

In my opinion the mere transfer by the New Haven Company of the shares of the Holding Company to the trustees named in the decree in accordance with the order of the United States District Court was not a violation of the laws of this Commonwealth. The decree, however, plainly contemplates a sale of the Maine Company stock held by the Holding Company under such terms and conditions as the court shall hereafter fix. Ordinarily it would not be presumed that the United States District Court would direct such a sale to be made in any manner in violation of the laws of this Commonwealth. But the execution of this decree necessarily involves a sale upon some conditions of the Maine Company stock now owned by the Holding Company, a distribution of its assets and a dissolution of the corporation. Chapter 519 of the acts of 1909 expressly forbade any sale of that stock "without the express authority of the legislature." That statute also seems to contemplate the continued existence of the Holding Company as an instrumentality created by this Commonwealth for the better supervision by it of the Maine Company. If, under these circumstances, as seems to be contemplated by the decree, the United States District Court shall hereafter, without the consent of the Legislature of Massachusetts, order a sale of

this stock, and the purchaser at such sale shall thereby acquire a good title to the stock, it is apparent that the terms of the act creating the Holding Company will then be violated.

The provision of the decree, already quoted, seems to contemplate that an order directing a sale of the Maine Company stock may be entered at any time before July 1, 1915, upon the written consent of the New Haven Company, without notice of any sort to this Commonwealth. The decree recites that upon an application made after July 1, 1915, after a hearing at which the Commonwealth of Massachusetts "shall be *invited* to appear," the court shall direct the sale and fix the terms and conditions thereof. The decree is silent as to the purpose of this invitation, nor does it suggest what would be the effect of its acceptance by the Commonwealth.

An examination of the record in this suit, made on February 19, shows that there have been no proceedings of record since the entry of the decree on Oct. 17, 1914. That such rights as the Commonwealth may have acquired by the act creating the Holding Company be not prejudiced by any subsequent proceedings without notice, I have requested the court and the Attorney-General of the United States to give me notice of all future applications made to the court in this case before any order is entered thereon. However, there may be some doubt whether the Commonwealth would be permitted to intervene in this suit. For that reason, and in view of the history of the Holding Company, it may be appropriate for the General Court to consider the advisability of taking action to enable the Attorney-General to appear, in the present suit or in any subsequent proceeding, in behalf of the Holding Company, in order to protect whatever interest the Commonwealth may have in the stock of the Holding Company or in the Maine Company stock held by the Holding Company, and also the rights of the Holding Company itself as an instrumentality of the Commonwealth of Massachusetts.

6. As stated in my answer to your first question, a transfer by the New Haven Company of the shares of the Holding Company in accordance with the decree and in a different

manner from that contemplated by section 1 of chapter 766, is not in my opinion an acceptance of the provisions of that act. Section 3 takes effect only upon such acceptance of the act by the transfer, as provided in sections 1 and 7. In my opinion section 3 has not been in effect accepted by this transfer made under the decree. This section has been evaded only in the sense that the determination of the terms and conditions under which the Maine Company stock is to be sold has been postponed by the court for future adjudication, without reference to said section.

TOWNS — FIREWARDS — APPOINTMENT BY SELECTMEN.

The office of fireward established by the General Court of the Province in 1711 and existing under R. L., c. 32, § 9, was not abolished by St. 1907, c. 475, §§ 5 and 10, creating forest firewards. Firewards may still be appointed by selectmen of towns when there is no organized fire department.

You ask if the selectmen in towns may now appoint firewards under R. L., c. 32, § 9, or if the office of fireward has been abolished by St. 1907, c. 475, §§ 5 and 10.

To the State
Forester.
1915
March 1.

Firewards have been recognized by law in this Commonwealth for more than two hundred years, and up to the enactment of the law creating forest firewards it was the duty of firewards to direct the work of fighting forest fires as well as other fires.

The earliest law providing for the appointment of firewards, which constituted the nucleus of the first official fire department in the Commonwealth, was passed by the General Court of the Province of Massachusetts Bay on Oct. 31, 1711. The first section of the act provides:—

That it shall and may be lawful, to and for the justices of the peace and selectmen of the town of Boston, from time to time to appoint such number of prudent persons, of known fidelity, not exceeding ten, in the several parts of the town, as they may think fit, who shall be denominated and called firewards, and have a proper badge assigned to distinguish them in their office: viz., a staff of five feet in length, coloured red, and headed with a bright brass spire of six inches long; and at times the breaking forth of fire, and during the continuance thereof, shall

and hereby are fully authorized and empowered to command and require assistance for the extinguishing and putting out the fire, and for removing of household stuff and furniture, goods and merchandizes, out of any dwelling-houses, storehouses, or other buildings actually on fire, or in danger thereof, and guards to secure and take care of the same; as, also, to require assistance for the pulling down or blowing up of any houses, or any other service relating thereto, by the direction of two or three of the chief civil or military officers of the town (as is by law provided), to stop and prevent the further spreading of the fire, and to suppress all tumults and disorder.

The extension of the fireward system was provided for in 1744 by chapter 30 of the acts of that year, section 1 of which reads:—

That the several towns within this province may, if they see fit, at their anniversary meeting in March, annually appoint a suitable number of persons, not exceeding ten, who shall be denominated firewards, and have each, for a distinguishing badge of the office, a staff of five feet long, painted red, and headed with a bright brass spire six inches long.

Sections 9 and 10 of chapter 32 of the Revised Laws, which is the last enactment on the subject, are as follows:—

SECTION 9. The selectmen of a town may annually, in March or April, appoint firewards and forthwith give them notice thereof. Whoever neglects, within seven days after such notice, to file with the town clerk his acceptance or refusal of the office shall, unless excused by the selectmen, forfeit ten dollars.

SECTION 10. If a fire breaks out, the firewards shall immediately repair thereto, and shall carry a suitable staff or badge of office.

By the laws of 1784, chapter 64, provision was made for the appointment of enginemen in towns, and chapter 42 of the Acts of 1785 provided that the "said enginemen appointed as aforesaid shall be held and obliged to go forward either by night or by day under the direction of the firewards in the same town." Laws authorizing the organization of fire departments were later enacted, but in no enactment was the fireward law repealed.

The office of forest fireward was created by St. 1886, c. 296, which provided that such firewards should, in respect to fires

in woodlands, have and exercise the powers and duties prescribed for forest fires. This law was amended by St. 1907, c. 475, and the powers and duties of forest firewards, with the change of name to forest wardens, were more clearly defined. No repeal of the original fireward law was effected, and that law, as revised and codified in the Revised Laws, still stands.

Firewards may be appointed, but they no longer have jurisdiction over forest fires, and in towns having organized fire departments there would seem to be no reason for their existence. Where there is no fire department in a town, engineers and hosemen are, by R. L., c. 32, § 28, "under the direction of the firewards." In such communities the historical character of fireward still exists, and he may even carry a badge or staff to distinguish him, though the original staff five feet in length, colored red, headed with a bright brass spire six inches long, is not now required.

EXECUTIVE COUNCIL — POWERS — REMOVAL OF PUBLIC OFFICER — NO RIGHT TO RECONSIDER REMOVAL AFTER APPOINTMENT AND QUALIFICATION OF SUCCESSOR.

The Executive Council has no power on its own initiative to reopen or in any manner revise the matter of the removal of the Commissioner of Animal Industry by the Governor, with the advice and consent of the Council, during the previous political year and after the appointment and qualification of his successor, assuming that removal to have been legal.

In such a case the Executive Council cannot properly, on petition of the person thus removed, hear or consider any evidence bearing upon the charges made against him at the time of his removal, whether that evidence was then heard or not.

The Executive Council has no power to reconsider the consent given by it to an appointment to public office by the Governor after the appointee has duly qualified as such public officer, whether that consent was given during the term of the councillors then in office or that of their predecessors.

I beg to acknowledge the receipt of your communication of February 25, in which you ask my opinion upon the following question: —

To the
Governor
and Council.
1915
March 9.

Has the Executive Council the constitutional power to reopen on its own initiative the case of the Commissioner of Animal Industry, who

has been removed from office during the preceding political year by the Governor, with the advice and consent of the Council?

Also the communication of your committee appointed by His Excellency "to frame such other questions as they desire in reference to the petition of Mr. Walker to the Executive Council, asking to have his case reopened," dated March 4, 1915, requesting my opinion upon the following questions:—

1. Can the present Executive Council hear such evidence as the petitioner may wish to present, and after such hearing may the Council give such advice to the Governor as the facts seem to them to warrant?

2. Does the question of hearing the petitioner come under the provisions of Article I., section III., chapter II., of the Constitution of Massachusetts, and if coming under said provisions is the Governor simply a member of the Council with one vote?

3. If a public official has been removed by the Governor with the advice and consent of the Council, can that Council, or its successor in office, consider evidence which such official desires subsequently to present and which he claims was not formerly heard, to determine whether the advice given to the Governor was warranted in view of the evidence thus brought to its attention?

I shall refer to the question contained in your communication of February 25 as your first question and to the questions contained in your communication of March 4, numbered 1, 2 and 3, as your second, third and fourth questions.

Your first question, I take it, has for its purpose your desire to ascertain whether the Council can, of its own initiative, in any way set aside or alter the effect of the action of the Governor and Council of the political year ending Jan. 7, 1915, in removing Fred F. Walker from the office of Commissioner of Animal Industry. It assumes that his removal was lawful, and acting upon that assumption I proceed to answer your question.

In an opinion rendered to the Governor and Council on May 29, 1906 (190 Mass. 616), it was said by the justices of the Supreme Judicial Court that "where the Constitution declares the power to act is in the Governor, or that the act

may be done by the Governor, 'by and with the advice of Council,' or 'by and with the advice and consent of the Council,' " they were of the opinion that the only connection that the Council can have with the power is advisory, and that "unless the Governor first determines upon the act there is no occasion for their participation by way of advice or consent."

While the appointment of the Commissioner of Animal Industry by the Governor, with the advice and consent of the Council, is not made by virtue of the Constitution but through authority granted by the General Court in an act entitled "An Act to abolish the Cattle Bureau of the State Board of Agriculture and to create a Department of Animal Industry," (St. 1912, c. 608), yet the principles involved are the same, and the reasoning of the justices of the Supreme Judicial Court in the opinion referred to is applicable to the question presented.

It would appear, therefore, that, assuming the removal of Fred F. Walker was lawful, the Council has no authority, of its own initiative, to take any action toward the reinstatement of Mr. Walker to the position of Commissioner of Animal Industry. Furthermore, assuming that the Council has the right to initiate proceedings looking toward his reinstatement, it is apparent that any action it may take at this time will be without any legal effect whatever. The records of the Governor and Council for the political year ending Jan. 7, 1915, disclose that on the first day of January, 1915, the Governor, acting by and with the consent of the Council, removed Fred F. Walker from the office of Commissioner of Animal Industry, and that on the same day the Governor, acting by and with the consent of the Council, appointed Lester H. Howard Commissioner of Animal Industry, and that on the second day of January, 1915, the said Lester H. Howard duly qualified as such commissioner.

Obviously, the present Council has no power to revise the action of the former Council in its confirmation of the appointment of the said Lester H. Howard, who has accepted the appointment of Commissioner of Animal Industry and duly qualified therefor, nor, in my opinion, could the former Coun-

cil vote to reconsider its advice and consent to his appointment after he had duly qualified as such commissioner. If the law were otherwise it would tend to chaos in government, as it would follow that appointees, including judges, after their appointment and confirmation, and after they had duly qualified and entered into the performance of their duties, could be later ousted from office by a reconsideration by the Council of its advice and consent to the appointment. This would result in the acts of the officials ousted being put in question, if not made null and void.

Hon. Dana Malone, a predecessor in this office, on March 6, 1907, rendered an opinion to His Excellency Governor Guild, that the Council, having once given its advice to the Governor in relation to an appointment to or removal from office, and gone upon record, could not initiate of themselves further discussion of the matter.

It follows in my opinion that the answer to your first question must be in the negative.

Your second question asks my opinion as to whether the present Council can hear such evidence as the petitioner, Fred F. Walker, desires to present in relation to a petition filed by him with the Governor and Council on the twenty-sixth day of January, 1915. This petition, a copy of which was submitted to me with your questions, alleges that Mr. Walker's removal was unlawful, and that by reason of his removal being unlawful he desires a hearing upon certain charges contained in a report of the Commission on Economy and Efficiency, in order that, in the event that the present Council finds the charges unfounded, he may be reinstated. You ask me to answer your question upon the assumption that his removal was lawful.

Assuming that the removal was lawful, the Council, in my opinion, has no jurisdiction of the subject-matter contained in the petition, and any advice given or any action taken by it upon the petition would be without any force or effect whatever.

While it is apparent that if the members of the Council.

notwithstanding their want of jurisdiction in the premises, desire to listen to such evidence as Mr. Walker may wish to present, they may do so, I am of the opinion that they cannot, as the Council, properly hear or consider such evidence, as the matter to which the evidence relates is not one within its province.

In reply to your third question, assuming that the removal of Mr. Walker was lawful, I am of the opinion that as the Governor and Council are without jurisdiction of the subject-matter contained in the petition, the question of a hearing upon the same does not fall within the provisions of Article I. of section III. of chapter II. of the Constitution of Massachusetts.

In reply to your fourth question, which is asked upon the assumption that the removal of the official was lawful, I am of the opinion that the Council cannot properly hear evidence of the character stated in your question. Manifestly, the only purpose for hearing and considering such evidence, where an official has been legally removed from office, would be to pass upon the wisdom of the judgment of a former Council. The duties and powers of the Council, except such as are created by the General Court, are defined in the Constitution of Massachusetts. I know of no act of the General Court nor provision of the Constitution which warrants such action by the Council.

CONSTITUTIONAL LAW — FREEDOM OF CONTRACT — POLICE
POWER — REGULATION OF SALE OF NEWSPAPERS AND
PERIODICALS IN COMBINATION.

A proposed act declaring illegal any agreement by news dealers, news agents and publishers which provides for the sale of two or more newspapers or periodicals only in combination with each other, or unless offered separately at the current price, would be unconstitutional if enacted, as denying the equal protection of the law in violation of the Fourteenth Amendment of the Constitution of the United States and as not being a reasonable regulation in the interests of the public health, safety, morals or general welfare under the police power.

To the House
of Repre-
sentatives.
1915
March 15.

I have the honor to acknowledge receipt of an order, passed by the House of Representatives on March 3, 1915, requesting the Attorney-General to inform the House of Representatives whether or not in his opinion the bill printed as House Bill No. 437, which provides for the regulation of the sale of newspapers and periodicals, would be constitutional if enacted.

The main purpose of the bill seems to be declared in sections 2 and 3, which are as follows:—

SECTION 2. Every newspaper or other periodical publication offered for sale in this commonwealth shall be offered separately at the current price for such publication, and it shall be unlawful for any newsdealer, news agent or publisher of any newspaper or other periodical to enter into any agreement, compact or understanding with any person, firm or corporation in this commonwealth with the intent to deprive any purchaser of the privilege of buying any newspaper or periodical singly and separately at the current price of each publication.

SECTION 3. It shall be unlawful to insert one newspaper within another newspaper or periodical issued from a different office of publication or to offer such combination or publications for sale without affording the purchaser the opportunity to buy either newspaper or publication separately if he so desires at the current price of each publication.

These sections are directed solely at news dealers, news agents and publishers of newspapers and periodicals. Section 2 appears to make illegal any agreement by persons engaged in such business which provides for the sale of two or more publications only in combination with each other. Any such agreement, the natural effect of which is to deprive any person within the

Commonwealth of the privilege of buying any newspaper or periodical separately and at its current price, comes within the prohibition of the statute. All agreements to sell two publications only at a single price are rendered criminal, even though the price set for the combination is substantially less than the sum of the usual prices of the single publications when sold separately. Thus many agreements between publishers and agents which are for the purpose of establishing so-called club rates, often most advantageous to the public, would seem to be rendered illegal.

Section 3 makes it unlawful for any person to offer for sale any combination of two or more publications at any price however low unless each publication is also offered for sale separately at its current price. Thus dealers in one kind of property are forbidden to sell their wares in combination when dealers in other kinds of property are permitted to sell their goods as they please.

Plainly, these sections, if enacted, would impair the freedom of contract and deny equal protection of our laws to certain of our citizens. Therefore, they come within the limitations of the Fourteenth Amendment to the United States Constitution and the Declaration of Rights of the Constitution of Massachusetts, unless they can be supported as reasonable regulations under the police power. This power is defined by Part II., chapter I., section I., article IV. of the Constitution of Massachusetts as the power "to make, ordain, and establish, in all manner of wholesome and reasonable orders, laws, statutes, and ordinances, directions and instructions, either with penalties or without; so as the same be not repugnant or contrary to this constitution, as they shall judge to be for the good and welfare of this commonwealth, and for the government and ordering thereof, and of the subjects of the same. . . ."

Regulations enacted under this power, particularly those which impose burdens upon a limited class of our citizens, must be reasonably directed toward the preservation of the public health, the public safety, the public morals, and, to a more limited extent, the public welfare. Under the guise

of the police power the General Court cannot impose upon one class of our people special burdens which, when tested by sound reason, can be found to perform no reasonable service in advancing those fundamental public interests.

The publishing and the selling of newspapers and periodicals are not public callings. Persons engaged in those callings have the right to sell or to refuse to sell to whom they will. It is doubtful if the General Court would have any constitutional authority to regulate the prices at which such publications should be sold. They are not necessities of life, and no person has any inherent right or privilege to buy them at any price singly or in combination. The bill discloses, and I am able to perceive, no reasonable basis for placing persons engaged in this business in a class by themselves and imposing upon them special burdens not imposed upon persons engaged in the production, distribution and sale of other commodities. This classification seems to me to bear no relation to the public health, safety, morals or the general welfare within the meaning of the police power.

I therefore reply to your order that in my opinion, for the reasons above stated, the bill printed as House Bill 437 would be unconstitutional if enacted.

CO-OPERATIVE BANKS — LOANS TO SHAREHOLDERS — MATURED SHARES.

A co-operative bank is not authorized to execute loans to shareholders on matured shares held in accordance with St. 1912, c. 623, § 17, as amended by St. 1914, c. 643, § 6.

To the Bank
Commissioner,
1915
March 19.

You have requested my opinion as to whether a co-operative bank is authorized to execute loans on matured shares belonging to a shareholder.

The provisions of law relating to this subject are found in St. 1912, c. 623, § 17, as amended by St. 1914, c. 643, § 6, and §§ 22 and 25, which are as follows: —

SECTION 17. Whenever shares of a given series reach the value of two hundred dollars, either by the payment of dues, the addition of a regular dividend or the addition of interest as hereinafter provided, they shall be deemed matured and all payments of dues thereon shall cease, and the owner of each unpledged share shall be paid out of the funds of the corporation the matured value thereof; or if he shall so elect, and at the option of the directors, there may be entered on his pass book any number of shares that have matured, not exceeding ten, and such shares shall continue as matured shares in said corporation, subject to be withdrawn or retired as provided in sections fourteen and sixteen of this act, but at no time shall more than one half of the funds in the treasury be applicable to payment of shares, either matured or unmatured or both, without the consent of the directors and except as hereafter provided in section eighteen. . . .

SECTION 22. A borrowing shareholder shall, in addition to dues on shares, pay monthly interest, or interest and premium, on his loan at the determined rate until his shares reach their matured value, or the loan has been repaid; and when said matured value is reached, the shares shall be cancelled, the loan discharged and the balance, if any, due upon the shares, shall be paid to the member. . . .

SECTION 25. Loans may be made upon unpledged shares to an amount not exceeding ninety-five per cent of their withdrawal value at the time of the loan, and for every such loan a note shall be given, accompanied by a transfer and pledge of the shares borrowed upon. . . .

Co-operative banks are not ordinary institutions for savings, and are not intended to be banks where money may remain on deposit indefinitely, although, under certain conditions, ten shares are permitted to be continued in the corporation as matured shares.

The purpose of co-operative banks may be said to be to effect the saving of money by a compulsory method as distinguished from the permissive policy maintained by other banks. The only departure from this purpose is the provision in the statute giving the right to hold ten matured shares as above stated.

The statute does not specifically provide for loans on these matured shares, and in my opinion does not authorize such loans by implication.

BOARDS OF HEALTH OF CITIES AND TOWNS — POWER TO
REGULATE TRADE — ICE CREAM.

Under the provisions of R. L., c. 56, § 70, as amended by St. 1912, c. 448, boards of health of cities and towns may, subject to the approval of the State Department of Health, make and enforce rules and regulations governing the manufacture, care and sale of ice cream.

To the State
Department
of Health.
1915
March 22.

Your request for an interpretation of chapter 448 of the Acts of 1912, as relating to the authority of local boards of health over the manufacture, sale and care of ice cream, has been given consideration.

The statute referred to is an amendment of section 70 of chapter 56 of the Revised Laws, which chapter relates to the regulation of trade. The original section was altered by adding another paragraph. This statute as amended is as follows: —

Boards of health of cities and towns, by themselves, their officers or agents, may inspect the carcasses of all slaughtered animals and all meat, fish, vegetables, produce, fruit or provisions of any kind found in their cities or towns, and for such purpose may enter any building, enclosure or other place in which such carcasses or articles are stored, kept or exposed for sale. If, on such inspection, it is found that such carcasses or articles are tainted, diseased, corrupted, decayed, unwholesome or, from any cause, unfit for food, the board of health shall seize the same and cause it or them to be destroyed forthwith or disposed of otherwise than for food. All money received by the board of health for property disposed of as aforesaid shall, after deducting the expenses of said seizure, be paid to the owner of such property. If the board of health seizes or condemns any such carcass or meat for the reason that it is affected with a contagious disease, it shall immediately give notice to the board of cattle commissioners of the name of the owner or person in whose possession it was found, the nature of the disease and the disposition made of said meat or carcass.

Boards of health of cities and towns may make and enforce reasonable rules and regulations, subject to the approval of the state board of health, as to the conditions under which all articles of food may be kept for sale, or exposed for sale, in order to prevent contamination thereof and injury to the public health. Before the board of health of any city or town submits such rules and regulations to the state board of health for approval it shall hold a public hearing thereon, of which notice shall be given by publication for two successive weeks, the first publication to be at least fourteen days prior to the date of the hearing, in a newspaper

published in such city or town, or, if none is so published, in a newspaper published in the county in which such city or town is located. Any person affected by such rules and regulations, in the form in which they are presented to the state board of health for approval, may appeal to the said board for a further hearing, and said board shall not grant its approval to rules and regulations concerning which such an appeal has been taken until it has held a public hearing thereon, advertised in the manner specified above in this section with reference to hearings before boards of health in cities and towns.

Naturally the question arises because the first paragraph of the section gives authority to the boards of health to inspect slaughtered animals, meat, fish, vegetables, produce, fruit or "provisions of any kind," while the added paragraph empowers such boards to make and enforce regulations as to the conditions under which all articles of food may be kept for sale. Do the specific articles mentioned in the first paragraph of the section limit the words "all articles of food" in the last paragraph?

It has been held by a former Attorney-General that these words do not include milk, and therefore local boards of health have no authority under this section to make regulations dealing with that commodity. Sections 51 to 67, inclusive, of said chapter 56 of the Revised Laws are milk regulations, and the former Attorney-General was of the opinion that these sections deal with the milk question so effectively that sections 70 to 76, inclusive, do not extend the authority of boards of health to milk, since the word "milk" was not used in the following sections. This ruling, however, was very properly limited to milk.

Ice cream is not covered by the statute on regulation of trade, unless section 70, as amended, applies to this commodity. Ice cream may be classified under the head of "provisions," and it also comes within the definition of a food. Hence, I am of opinion that local boards of health may make and enforce rules and regulations governing the manufacture, care and sale of ice cream, subject to the approval of the State Department of Health.

STATUTES — GENERAL AND SPECIAL — CODIFICATION — SPECIAL
 STATUTE NOT REPEALED BY CODIFICATION OF GENERAL
 STATUTES — BOSTON CONSOLIDATED GAS COMPANY.

St. 1906, c. 422, entitled "An Act to promote the reduction of the price of gas in the city of Boston and its vicinity," generally known as the "sliding scale act," was not repealed or superseded by St. 1914, c. 742, entitled "An Act to consolidate the laws relative to the manufacture, distribution and sale of gas and electricity."

To the House
 of Repre-
 sentatives.
 1915
 March 23.

By an order adopted by the House of Representatives on March 10, 1915, my opinion was requested as to whether "chapter 422 of the Acts of the year 1906, entitled 'An Act to promote the reduction of the price of gas in the city of Boston and its vicinity,' and especially section 10 of said chapter, was repealed or superseded by chapter 742 of the Acts of the year 1914, entitled 'An Act to consolidate the laws relative to the manufacture, distribution and sale of gas and electricity.'"

The 1906 act, generally known as the "sliding scale act," provided a method of fixing the price of gas sold by the Boston Consolidated Gas Company and of the dividends to be paid by that company. The 1914 act is a consolidation and revision of the general laws relative to the manufacture, distribution and sale of gas and electricity. Section 199 thereof repeals by express mention seventy-two acts and sections of acts. It is significant that chapter 422 of the Acts of 1906 is not included in this list.

It has been suggested that section 199 repeals chapter 121 of the Revised Laws "and all acts in amendment thereof," and that section 10 of chapter 422 of the Acts of 1906 is an amendment of that chapter. It may be that in discussing the meaning of the word "amendment," as used in other connections, courts have used at times language which in its broadest sense might include such a case as this.

Bouvier defines "amendment" as an alteration or change of something proposed in a bill or established as law. The Century Dictionary says:—

The act of freeing from faults; the act of making better, or of changing for the better; correction; improvement; reformation. An alteration

of a legislative or deliberative act or in a constitution; a change made in a law either by way of correction or addition.

The term "amendment" implies such an addition or change within the lines of the original instrument as will effect an improvement or better carry out the purposes for which it was framed. *Livermore v. Waite*, 102 Cal. 113.

Section 10 of chapter 422 of the Acts of 1906 hardly comes within such definitions. Furthermore, it has been expressly held that neither extending a general law to a corporation not included within it nor exempting a particular municipal corporation from the terms of a general law is an amendment thereof. *Quinlan v. H. & T. C. Ry. Co.*, 89 Tex. 356; *Barron v. Smith*, 108 Md. 317.

I am of the opinion that said section 10 was not an amendment of R. L., c. 121, in the sense here intended.

Section 199 also repeals "all other acts and parts of acts inconsistent herewith."

Without the express words an absolutely inconsistent or repugnant provision of earlier laws would be superseded or repealed, although such repeal by implication is not favored by the courts. *Copeland v. Springfield*, 166 Mass. at 504. Indeed, it has been said that the insertion of a clause like that quoted above adds nothing to the legal effect consequent upon the passage of the new act. *The Hickory Tree Road*, 43 Pa., 139, 142.

The question here is whether, in view of these principles and the language of the 1914 act, the earlier special law is inconsistent with the later general one, and therefore repealed.

It is to be observed that a special law as to one locality or corporation is not necessarily inconsistent with a different rule applicable to localities or corporations generally. Things which can stand together harmoniously and are not contradictory are consistent. If other sections such as are found in the 1906 act had been included in the 1914 act, after the general provisions in sections 43, 162 and 163, it could not well have been said that the consolidated act was inconsistent or self-contradictory.

Cases may be found which hold that the passage of a general law containing such a repeal clause as is here found operates as a repeal of special laws upon the same subject. The cases of *People v. Wenzel*, 105 Mich. 70, *O'Malley v. County*, 3 Kulp (Pa.), 41, 46, and *Brown v. Mullica Township*, 48 N. J. L. 447, are examples of this.

Nevertheless, the general rule is otherwise, and it is well stated in the last-named case, as follows:—

It has been well settled in this State that a general law on a subject-matter which has been provided for in certain localities by special laws will not, although it contain a general repealer of acts inconsistent with it, annul or alter the special provisions in those localities. But if the general law expressly repeals the special laws, or shows by implication a *manifest intent* to supersede their provisions, the latter must yield.

This intention is to be gathered from the language of the entire act, construed in the light of its history. In construing an act, "the title of the act, the objects to be accomplished, the other provisions found in connection with those under especial consideration, the provisions and arrangement of the statutes which were amended, the mode in which the embarrassing words were introduced, as shown by the journals and records, the history of the times, and especially of prior legislation upon the same general subject, may all be considered." (*Simpson v. Story*, 145 Mass. 497, 498.)

Where a general law is passed for the first time there is much more reason for holding that prior special acts are repealed than in a case of codification and revision. In the former case it is far easier to discover a legislative purpose to repeal special provisions, because the Legislature is then for the first time declaring that it is making a law applicable to all, and thus it may more naturally be construed to exclude the idea of special laws continuing. Where, however, a general and a special law have been in existence, working harmoniously side by side, the re-enactment in codification of the general law, either in identical terms or with some perfecting amendments, furnishes little, if any, ground for such argument.

At the time of the passage of the 1906 act and throughout the time of its operation, there were in force and effect general laws covering the same subjects as those portions of the codification which could be argued to be inconsistent with the 1906 act, and for large part in the same language. This is especially true of sections 162 and 163, which are re-enactments of R. L., c. 121, §§ 34 and 35, referred to in section 10 of chapter 422 of the Acts of 1906.

Section 200 of the 1914 act, adopting in general the law as laid down in *Wright v. Oakley*, 5 Met. 400, provides:—

The provisions of this act, so far as they are the same as existing statutes, shall be construed as a continuation thereof and not as new enactments, and a reference in a statute which has not been repealed to provisions of law which have been revised and re-enacted herein, shall be construed as applying to such provisions as so incorporated in this act.

This section makes provision whereby both acts may work in harmony with each other. The enactment of sections 162 and 163 was not in any sense the making of a new law but merely a continuation of the law from which the 1906 act expressly exempted the Boston Consolidated Gas Company.

The history of the 1914 act is especially enlightening. In 1912, by chapter 51 of the Resolves, the Legislature directed the Board of Gas and Electric Light Commissioners "to revise, consolidate and arrange the *general* laws of the Commonwealth pertaining to the manufacture, transmission, distribution and sale of gas and electricity, and to corporations engaged therein, not including street railway, telephone or telegraph companies, and in connection therewith to consider the expediency of additional legislation affecting the relation of such corporations to the public and to one another, and of extending the provisions of law for supervision and regulation to any or all of them." In 1913 that Board recommended certain extensions and changes of the existing general laws, with a bill codifying those laws and embodying the extensions and changes recommended. These recommendations did not mention the extension of the gen-

eral laws to the Boston Consolidated Gas Company so far as it was exempted by the 1906 act. The bill contained a repealing section substantially in the words that now appear. After some consideration and alteration the Legislature of 1913 referred this matter to the next General Court.

In 1914, upon motion, it was taken from the files and referred to the Committee on Public Lighting. This committee inserted the word "general" in section 199, so that the repealing clause in question read, "and all other *general* acts and parts of *general* acts." This clause remained in this form throughout its consideration in the Senate and until referred to the House Committee on Bills in the Third Reading, which committee struck out the word "general" and reported the bill to the House without specific mention of its action in so doing. In view of House Rule 26 it cannot be that the committee intended to make "any change in the sense or legal effect, or any material change in construction" of the act. Neither can it be thought that the committee intended to exceed its powers; and, especially in a bill of such length, the members of the Legislature undoubtedly acted in the later stages of the passage of the act on the presumption that it was the same in effect as before its reference to the House Committee on Bills in the Third Reading.

In these events there is nothing to indicate an intention to repeal this special act, but, on the contrary, the insertion of the word "general" by the committee which considered the bill on its merits, and the presence of that word during the passage of the act up to the time of reference to the House Committee on Bills in the Third Reading, shows a clear intention not to do so.

I am of opinion that the legislative purpose was clearly disclosed by the resolve authorizing the codification; that such act directed the Board to deal primarily with general statutes, and that the history of the passage of the codification, taken together with its phraseology, indicates no intention upon the part of the Legislature to repeal the provisions of chapter 422 of the Acts of 1906.

Accordingly, I am of the opinion that chapter 422 of the Acts of the year 1906 was not repealed or superseded by chapter 742 of the Acts of the year 1914.

FIRE PROTECTION — STORAGE OF INFLAMMABLE FLUIDS — GASOLINE IN AUTOMOBILE TANKS — STORAGE IN BULK.

Neither St. 1911, c. 477, nor any other statutes then in force concerning the storage of inflammable fluids were repealed by St. 1914, c. 795, entitled "An Act to provide for the better prevention of fires throughout the metropolitan district," and, accordingly, gasoline may still be kept without license or permit in the tanks of automobiles in those buildings in which it could be so kept prior to the passage of the last-mentioned statute, but in no others.

Inflammable fluids kept in unopened original receptacles, other than barrels, no one of which contains more than ten gallons, are not kept in bulk within the meaning of St. 1914, c. 795, § 6.

Varnishes and shellacs which are of substantially the same inflammable character as the least inflammable article enumerated in St. 1914, c. 795, § 6, come within the provisions of that section.

In your letter of the 17th inst. you request my opinion as to whether the provisions of section 6¹ of chapter 795 of the Acts of 1914 permit gasoline to be kept in the tank of an automobile without regulation by the Fire Prevention Commissioner, and if so, do the provisions of said chapter 795 repeal the provisions of chapter 477 of the Acts of 1911; and also my opinion as to whether the phrase "in bulk," in said section, includes varnishes, shellacs, etc., in cans, and if it does, is the size of the can a material element. In order properly to determine the questions raised, consideration must be given to the state of the law in relation to explosives and inflammable fluids at the time of the passage of chapter 795 of the Acts of 1914 and the various acts establishing the law.

To the Fire
Prevention
Commissioner.
1915
March 29.

By chapter 370 of the Acts of 1904 it was provided that no

¹ Reads as follows: —

SECTION 6. No paint, oil, benzine, naphtha, or other inflammable fluid shall be kept stored in bulk or barrel otherwise than in the tank of an automobile or motor boat or stationary engine, the total quantity exceeding ten gallons in any part of any building used for habitation, or within ten feet of any building used for dwelling purposes, unless such paint, oil, or other inflammable fluid is enclosed within a fireproof room or structure, constructed and arranged to the satisfaction of the commissioner, and no paint, oil, benzine, naphtha, or other inflammable fluid, except for domestic purposes shall be kept, used, stored or sold in any part of any building used for habitation, unless a permit therefor has first been obtained from the commissioner under such terms and conditions as he may prescribe.

building should thereafter be erected or used for the keeping, storage, manufacture or sale of explosives or inflammable fluids without a license granted by the mayor and aldermen or selectmen after a public hearing and a permit granted by the fire marshal's department of the District Police. The act provided, however, that any building lawfully used for any of said purposes at the time of its passage could still be continued in such use without a license or permit, but should be subject to the regulations of the fire marshal's department for protection against fire or explosion.

By chapter 502 of the Acts of 1908 it was provided that any building or other structure once used lawfully for any of said purposes could be continued so to be used from year to year if the owner or occupant thereof should, while such use continued, annually file for registration with the city or town clerk of the city or town where such building or other structure was situated, and with the chief of the District Police or the official designated by him to grant permits in such city or town, a certificate reciting such use and occupancy.

By chapter 477 of the Acts of 1911 it was provided that gasoline in an automobile or motor vehicle where more than two such vehicles were kept should be deemed to be a keeping of gasoline in a building under the provisions of chapter 370 of the Acts of 1904, and amendments thereof; provided, however, that it should not apply where not more than two automobiles were kept in a building erected prior to the enactment of said chapter, *i.e.*, May 26, 1911, if such building or any part thereof was not used either for human habitation or for holding gatherings of, or giving entertainments, instruction or employment to, more than twenty persons.

By chapter 223 of the Acts of 1910 it was provided that "the detective and fire inspection department of the district police may by regulation prescribe the amount of explosives, crude petroleum or any of its products, or any other inflammable fluid or compound, that may be kept for private use in a building or other structure without a license, permit or registration."

In substance, therefore, at the time of the passage of chapter 795 of the Acts of 1914 the keeping, storage, manufacture and sale of explosives or inflammable fluids in a building were prohibited unless a license was first granted by the mayor and aldermen or selectmen after a public hearing and a permit was granted by the fire marshal's department of the District Police, except that no permit or license was required for the keeping of explosives or inflammable fluids for private use in a building or other structure where regulations were established by the District Police prescribing the amount thereof. The exceptions to this general law were the keeping, storage, manufacture and sale of explosives and inflammable fluids in buildings that were lawfully used for such purposes prior to the passage of chapter 370 of the Acts of 1904, which could be continued to be used under the provisions of law, and the keeping of not more than two automobiles in any building erected prior to May 26, 1911. Thus, at the time of the passage of chapter 795 of the Acts of 1914 there were many buildings in the metropolitan district which were being lawfully used for the keeping, storage, manufacture and sale of explosives and inflammable fluids; and, in buildings in which automobiles in excess of two were kept prior to the passage of chapter 370 of the Acts of 1904, more than two automobiles could still be continued to be kept without any license or permit therefor; and in all buildings erected prior to May 26, 1911, not used either for human habitation or for holding gatherings of, or giving entertainments, instruction or employment to, more than twenty persons, not more than two automobiles could be kept, and the gasoline in their tanks did not come within the provisions of the general law.

By the passage of chapter 795 of the Acts of 1914 the Legislature, in my judgment, did not intend to allow the keeping of automobiles with gasoline in their tanks in greater numbers and in buildings other than those in which they could be kept at the time of its passage. To construe the act otherwise would be to interpret an intention of the Legislature to authorize the keeping of gasoline in automobiles

under less stringent regulations in the metropolitan district, where the liability of fire and explosion is greater and more stringent regulations are needed, than in other parts of the Commonwealth.

It is my opinion that the Legislature, by the passage of said chapter 795, had no intention of repealing the existing law applicable to the metropolitan district in relation to explosives and inflammable fluids, but intended that said chapter 795 should be in addition to the law already in operation. This view is given additional force by reason of the provisions of section 3 of said chapter 795, that all existing powers, in whatever officers, councils, bodies, boards or persons, other than the General Court and the judicial courts of the Commonwealth, they may be vested, to license persons or premises, or to grant permits for or to inspect or regulate or restrain the keeping, storage, use, manufacture or sale of explosives and inflammable fluids, shall be transferred to and vested in the Fire Prevention Commissioner.

I am therefore of opinion that in all buildings or other structures over which the District Police had the power of supervision and regulation prior to the passage of chapter 795 of the Acts of 1914, the Fire Prevention Commissioner has now the same power; and that as to all buildings, including those in the metropolitan district in which before the passage of that act gasoline and explosives could be kept without a permit or license, no paint, oil, benzine, naphtha or other inflammable fluid shall be kept or stored therein in bulk or barrel, otherwise than in the tank of an automobile or motor boat or stationary engine, in total quantity exceeding ten gallons, in any part of such building if used for habitation, nor within fifty feet of any building used for dwelling purposes, unless such paint, oil or other inflammable fluid is enclosed within a fireproof room or structure constructed and arranged to the satisfaction of the commissioner; and that in any building used for habitation, no paint, oil, benzine, naphtha or other inflammable fluid, except for domestic purposes, shall

be used, stored or sold in any part thereof without a permit from the commissioner.

Accordingly, I am of opinion that chapter 477 of the Acts of 1911 was not repealed by the provisions of chapter 795 of the Acts of 1914, and that gasoline may still be kept in the tanks of automobiles, without license or permit, in those buildings in which it could be so kept prior to the passage of said chapter 795, but in no others.

As to an interpretation of the phrase "in bulk," I am of the opinion that where gasoline or other inflammable fluids are kept in unopened original receptacles other than barrels, no one of which contains in excess of ten gallons, the inflammable fluids are not being kept in bulk, within the meaning of the act, and, therefore, that the size of the can or receptacle in which the inflammable fluid is kept is a material element.

Whether the provisions of section 6 of said chapter 795 include varnishes, shellacs, etc., in my judgment is dependent upon whether they are of substantially the same inflammable character as the least inflammable article enumerated in the section. If they are they come within the provisions of the act.

INSURANCE — FRATERNAL BENEFICIARY INSURANCE — SOCIETIES LIMITING MEMBERSHIP TO CERTAIN CLASSES — WHEN SUBJECT TO INSURANCE LAWS.

A domestic fraternal beneficiary corporation which limits its membership to certain classes of persons, as provided in St. 1911, c. 628, § 12 *b*, and pays a death benefit in excess of \$200, does not come within the exemption provided by section 29 *b*, and must conform to the insurance laws of the Commonwealth.

You have requested my opinion as to whether a fraternal beneficiary corporation, referred to in section 29 *a* of chapter 28 of the Acts of 1911, which pays a death benefit of \$500, is exempted under the provisions of section 29 *b* from otherwise conforming to the provisions of the insurance statutes.

To the
Insurance
Commissioner.
1915
April 5.

Section 29 *b*, as amended by section 5 of chapter 617 of the Acts of 1913, is as follows:—

A domestic fraternal beneficiary society, as defined in section one of this act, whether incorporated or unincorporated, which limits its membership as provided in division *b* of section twelve; or which limits its membership to the members and ex-members of any social organization having a lodge system and secret form of work, or a secret order or fraternity, which order or fraternity operates on the lodge system with a representative form of government and grants insurance benefits as incidental only to the work of the order or fraternity; or a purely charitable association or corporation existing on the twenty-third day of May, nineteen hundred and one, any one of which pays a death or funeral benefit limited to not more than two hundred dollars, disability benefits not exceeding ten dollars per week, or any or all of such benefits, and which is not conducted as a business enterprise or for profit, . . . may transact business in this commonwealth without conforming to the provisions of this act or other acts relating to insurance companies, except division *b* of this section; . . .

You state that the attorney for the company in question argues that inasmuch as the preliminary clauses of section 29 *b* are separated by semicolons, the words “any one of which pays a death or funeral benefit limited to not more than two hundred dollars,” etc., merely apply to “a purely charitable association or corporation existing on the twenty-third day of May, nineteen hundred and one.” Such a construction would hardly seem reasonable even if chapter 628 of the Acts of 1911 were the first legislation on this subject, as the words “any one of” would be surplusage if the interpretation contended for were correct and would furnish a most awkward mode of expression for that thought.

However, the 1911 act is but one of a rather lengthy series of enactments on this subject. The words in question seem first to appear in St. 1899, c. 442, § 17, which is as follows:—

Any fraternal beneficiary corporation, or any association that limits its membership to a particular order, class or fraternity, or to the employees of towns, cities, the Commonwealth, or the federal government, or of a designated firm, business house or corporation, or any secret fraternity or order, or any existing purely charitable association or cor-

poration, any one of which pays a death or funeral benefit not exceeding two hundred dollars, . . .

Under this clause the contention made is clearly untenable, and the limitation of \$200 applies to each of the kinds of association mentioned. This interpretation is equally required by the later enactments. See St. 1901, c. 422, § 17; R. L., c. 119, § 12; St. 1903, c. 332.

Under these circumstances it seems entirely plain that a domestic fraternal beneficiary corporation which limits its membership as provided in division *b* of section 12 and pays a death benefit in excess of \$200 does not come within the exemption provided by said section 29 *b*.

STATE BOARD OF HEALTH — CREATION — EFFECT ON EXISTING HEALTH REGULATIONS.

Rules and regulations established under authority of R. L., c. 75, § 113, and the penalties for the infringement thereof established by R. L., c. 75, § 122, were not repealed or affected by St. 1914, c. 792, entitled "An Act to create a State Department of Health and to amend the public health laws."

You have requested my opinion as to whether chapter 792 of the Acts of 1914 in effect repealed the regulations made under section 113 of chapter 75 of the Revised Laws or took away the penalty for infringement of rules and regulations made under said section.

To the State
Department
of Health.
1915
April 5.

Chapter 792 of the Acts of 1914, entitled "An Act to create a State Department of Health and to amend the public health laws," in general provides for a State Department of Health which "shall exercise all the powers and perform the duties now conferred and imposed by law upon the state board of health," which latter Board was abolished by this act. Section 2 provides for the appointment of a Commissioner of Health, and that "his powers and duties shall be to administer the laws relative to health and sanitation and the regulations of the department; . . ." Section 3 provides for a public health

council "to make and promulgate rules and regulations; to take evidence in appeals; to consider plans and appointments required by law; to hold hearings; . . . but it shall have no administrative or executive functions." Sections 4 and 5 provide for divisions of the department and the appointment of directors of divisions and district health officers. The latter "shall have all the powers and perform the duties now provided by law for inspectors of health and further shall, under the direction of the commissioner of health, perform such duties as may be prescribed by, and shall act as the representative of the commissioner of health and under his directors shall secure the enforcement within his district of the public health laws and regulations."

Section 8 repeals sections 1, 2 and 3 of chapter 75 of the Revised Laws "and all other acts and parts of acts inconsistent herewith."

The sections expressly mentioned relate solely to the appointment and administration of the State Board of Health.

It will be seen that the new act is in all essential details an administrative provision. There are no sections creating or purporting in terms to change the public health laws, as such. If there had been any intention to enact such a radical provision as the abolition of all regulations previously made by the State Board of Health, there is every reason to suppose that explicit language to that effect would be found.

There is nothing in chapter 792 of the Acts of 1914 inconsistent with allowing valid rules and regulations previously made by the State Board of Health to continue in effect, and the express provision for enforcement by the new officers of the public health laws and regulations indicates an intention that they shall continue.

I am of the opinion that rules and regulations established under authority of section 113 of chapter 75 of the Revised Laws are not affected by St. 1914, c. 792, nor is the penalty for infringement of such rules and regulations established by R. L., c. 75, § 122, affected thereby.

FIRE PREVENTION — STORAGE OF PETROLEUM IN BUILDING OR
OTHER STRUCTURE — REQUIREMENT OF LICENSE.

R. L., c. 102, § 113, permitting the storage of crude petroleum or any of its products in certain buildings without the requirement of a license, was repealed by St. 1904, c. 370.

You have requested information relative to section 113 of chapter 102 of the Revised Laws, and as to whether the same has been repealed by subsequent enactments.

To the Fire
Prevention
Commissioner.
1915
April 8.

Section 113 provides that "crude petroleum or any of its products may be stored . . . in detached and properly ventilated buildings," under certain restrictions, and makes no provision for licensing said structures. St. 1904, c. 370, § 3, apparently repeals section 113, as it provides that no building shall be erected or used in any city or town for the keeping, storage, etc., of inflammable fluids unless the mayor and aldermen or selectmen have granted a license therefor after a public hearing. St. 1904, c. 370, § 3, was amended by chapter 502 of the Acts of 1908 by the addition of the words "or other structure," so as to read as follows: "No building or other structure shall be used in any city or town," etc.

It is to be noted that by the provisions of section 5 of chapter 370 of the Acts of 1904 so much of chapter 102 of the Revised Laws as was inconsistent with said chapter 370 was repealed.

Accordingly, I am of the opinion that section 113 of chapter 102 of the Revised Laws was repealed by the provisions of chapter 370 of the Acts of 1904 and acts in amendment thereof and in addition thereto.

REGISTERED OSTEOPATH — DEATH CERTIFICATE.

An osteopath registered under St. 1909, c. 526, may not legally furnish the death certificate required to be furnished by physicians under R. L., c. 29, §§ 10 and 12.

To the Board
of Registration
in Medicine.
1915
April 8.

You have requested my opinion as to whether an osteopath registered under St. 1909, c. 526, may legally furnish the death certificate required of physicians under R. L., c. 29, §§ 10 and 12.

R. L., c. 29, § 12, provides: —

Every undertaker or other person who has charge of a funeral shall forthwith obtain the *physician's* certificate required by section ten.

Section 10 (as amended by St. 1910, c. 322, § 2) provides: —

A physician shall forthwith, after the death of a person whom he has attended during his last illness, at the request of an undertaker or other authorized person or of any member of the family of the deceased, furnish for registration a standard certificate of death, stating to the best of his knowledge and belief the name of the deceased, his supposed age, the disease of which he died, defined as provided in section one of this chapter, where contracted, the duration of his last illness, when last seen alive by the physician, and the date of his death. . . .

R. L., c. 78, § 38, provides that no burial of a human body or removal of the same shall take place without a permit from the proper authorities, and for the issuance of a certificate by certain officials in a case of a death where there was no attending physician.

St. 1909, c. 526, permits the registration of osteopaths. Section 5 speaks of "the registration and practice of osteopathic physicians;" but it is expressly provided by section 3 that persons registered under that act shall not be permitted "to hold themselves out, by virtue of such registration, as and for other than osteopaths."

I am aware that it has been held that an osteopath is a physician, as the words are used and defined in certain statutes (*Bandel v. Department of Health of City of New York*, 127

App. Div. 382; 193 N. Y. 133), while under different statutes the opposite result has been reached (*Nelson v. State Board of Health*, 108 Ky. 769).

Our statutes have long used the word "physician," and for many years a physician, in order lawfully to practice, must have been duly registered. R. L., c. 76, § 3, provides that after examination, if found qualified, an applicant "shall be registered as a qualified physician."

In view of the express provision of St. 1909, c. 526, § 3, that an osteopath shall not hold himself out, by virtue of his registration, as and for other than an osteopath, it would seem that he is prohibited from attempting or purporting to act as a physician in giving the death certificates required by law.

I am of the opinion that a registered osteopath cannot legally sign such a death certificate.

CONSTITUTIONAL LAW — BOSTON ELEVATED RAILWAY COMPANY — LOCATIONS AND RIGHT TO MAINTAIN ELEVATED STRUCTURE — REVOCATION — REGULATION OF USE OF HIGHWAY.

A proposed act requiring the Boston Elevated Railway Company to "remove and forever discontinue the use of that part of its elevated structure which extends from the junction of Washington and Castle streets to the entrance of the old Tremont street subway in the city of Boston" at its own expense would be unconstitutional, if enacted.

St. 1894, c. 548, incorporating the Boston Elevated Railway Company and authorizing it to construct and operate lines of elevated railway upon certain specific locations, and particularly section 19 thereof, providing that "the locations of or right to maintain any elevated lines or structures of the Boston Elevated Railway Company shall not be subject to revocation except" as prescribed in P. S., c. 112, §§ 7 and 8, constitutes a contract between that company and the Commonwealth that, at least for a period of twenty-five years, these locations and the right to maintain elevated lines and structures thereon shall not be revoked.

So much of such proposed act as applies to the structure located across the right of way of the Boston & Albany Railroad and the New York, New Haven & Hartford Railroad Company would, if enacted, be unconstitutional as taking property without compensation.

The requirement of the proposed act, that the Boston Elevated Railway Company shall remove the entire structure described therein at its own expense and without compensation, is not a reasonable police regulation in the interest of the public health, safety or morals.

It is within the power of the General Court to determine that the Boston Elevated Railway Company has discontinued the use of that portion of the structure described in the proposed act which is within the limits of public ways; that it unreasonably interferes with the use of these ways by the public, and, by proper legislation, to require that company to remove it at its own expense and without compensation.

To the Senate.
1915
April 27.

I acknowledge receipt of a copy of the following order passed by the honorable Senate: —

Ordered, That the Attorney-General be required to furnish to the Senate his opinion upon the following important question of law: —

Is it within the constitutional power of the General Court to require the Boston Elevated Railway Company to remove, at its own expense, and without compensation, and forever to discontinue a part of the elevated structure owned by it in the city of Boston, located in part upon a public highway, in part upon the right of way of a railroad corporation, and in part upon private land owned by said Boston Elevated Railway Company, which structure is not now used by said company and which, in the opinion of the General Court, is detrimental to the public welfare?

This question is asked in reference to a bill pending in the General Court, being "An Act relative to the removal of certain elevated railway structures in the city of Boston," printed as House Document No. 1271, a copy of which is forwarded herewith for the information of the Attorney-General, and the Senate desires an opinion upon the constitutionality of said bill.

The bill referred to in this order is as follows: —

SECTION 1. The Boston Elevated Railway Company shall, in or within one year after the passage of this act, remove and forever discontinue the use of that part of its elevated structure which extends from the junction of Washington and Castle streets to the entrance of the old Tremont street subway in the city of Boston.

SECTION 2. Said structure being now obsolete, detrimental to the public welfare and a menace to public health, the expense in connection with its removal shall be borne by said company.

The Boston Elevated Railway Company was incorporated and authorized to construct and operate lines of elevated railway upon certain specific locations by chapter 548 of the Acts

of 1894. Section 8 of that statute provided in part as follows: —

The location, construction, maintenance or operation of said lines of railway in any public or private way shall be deemed an additional servitude and entitle lessees, mortgagees and other parties having an estate in such way or in premises which abut thereon, and who are damaged by reason of the location, construction, maintenance and operation of said lines of railway, to recover reasonable compensation in the manner herein provided. . . .

Before any work of construction had been begun this statute was amended by chapter 500 of the Acts of 1897. By section 3 of the last-mentioned statute certain additional locations were granted to the company, including, in the paragraph marked Fourth, the location involved in the bill submitted to me. Section 7 provides for the payment of damages sustained by any railroad by reason of the construction and operation of the elevated railway across the location or tracks of a railroad corporation.

Section 10 authorizes the corporation to establish a fare not to exceed 5 cents for a single continuous passage, and provides that this sum shall not be reduced by the Legislature during the period of twenty-five years from and after the passage of the act. It further provides that during said period of twenty-five years no taxes or excises shall be imposed upon the corporation not imposed upon street railways in general, and then provides that "as compensation for the privileges herein granted, and for the use and occupation of the public streets, squares and places, by the lines of elevated and surface railroad owned, leased and operated by it," the corporation shall pay a special franchise tax of a fixed percentage of its gross earnings.

Section 19 is as follows: —

The locations of or right to maintain any elevated lines or structures of the Boston Elevated Railway Company shall not be subject to revocation except in the manner and on the terms prescribed in sections seven and eight of chapter one hundred and twelve of the Public Statutes: *provided, however*, that any location upon which said corporation has not

constructed its railroad within ten years from the passage of this act shall be subject to revocation by the legislature; but no location upon which said corporation has begun the construction of its railroad within said period shall be subject to revocation if the same be completed within three years thereafter.

The sections of the Public Statutes referred to in the section just quoted merely reserved to the Commonwealth the right to acquire by purchase or to take by eminent domain all the franchises and property of any railroad corporation. They have no application to any question presented by the order.

Section 21 of the Acts of 1897 provides, in part, as follows: —

. . . the provisions of chapter one hundred and thirteen of the Public Statutes or other general laws relating to the alteration or revocation of the locations of street railway companies, shall not be deemed applicable to the locations or routes for elevated railroads granted to said corporation. . . .

The elevated structure described in the bill before me was erected and operated under these statutes. I am informed that various parties having estates in Castle Street and other public highways in which this structure is located, or in premises abutting thereon, have been paid compensation by the Boston Elevated Railway Company for damages suffered by reason of the location, construction, maintenance and operation of this line of railway in those streets, and that the Boston & Albany Railroad and the New York, New Haven & Hartford Railroad Company have been paid compensation for all damages suffered by them by reason of the construction and operation of the elevated railway across their locations and tracks.

By chapter 534 of the Acts of 1902 the Legislature authorized the construction of the Washington Street tunnel and its lease to the Boston Elevated Railway Company for the period of twenty-five years. By section 11 that company was authorized to connect this tunnel with its elevated structure and was granted a location from the southerly end of the tunnel

to its existing structure at the corner of Washington and Castle streets. Section 12 provided, in part, as follows: —

. . . The company, upon removal of its elevated trains from the existing subway, may discontinue the use of its elevated structures and locations connecting its elevated road therewith, and may sell any lands or other property acquired for the purposes of such connection. . . .

The existing subway referred to is the Tremont Street subway.

As recited in the order, the elevated structure referred to in the bill is located in part on public highways, in part across the right of way of certain railroad corporations, and in part upon private land of the Boston Elevated Railway Company. Thus the rights of the company vary somewhat with these different locations.

It is well settled in this Commonwealth that locations in public highways granted to ordinary street railways are licenses only; that they are revocable at any time without the payment of compensation therefor. It is also clear that such locations do not impose additional servitudes upon highways, and that persons owning estates in a highway or in premises abutting thereon are not entitled to compensation by reason of such locations.

The statutes under consideration, however, expressly declared that the location, construction, maintenance and operation of the lines of the Boston Elevated Railway Company shall be deemed as imposing an additional servitude upon the highways in which they are situated. Accordingly, the company has been required to compensate all persons whose property abuts upon such highways. It follows that the company has thus acquired as against these abutters perpetual easements in the adjoining highway to maintain and operate its elevated structures. Whether, in the absence of other provisions, it would have also obtained a similar right against the public need not now be determined. There is a strong probability that in such a case the locations of this company in public highways, like those of ordinary street railways, would be held to be mere licenses revocable at the pleasure of the Legislature.

In view of the large expense involved in the erection of an elevated structure, this matter appears to have been given special consideration by the Legislature in framing chapter 500 of the Acts of 1897. Section 10, after declaring that for a period of twenty-five years the Legislature should not reduce fares upon the lines of the company below 5 cents, or impose special taxes upon it not imposed upon other street railways, provided for the annual payment by it to the Commonwealth, for a period of twenty-five years, of a special franchise tax in addition to the tax imposed upon street railways in general. It is expressly declared that this special tax is to be paid "as compensation for the privileges herein granted, and for the use and occupation of the public streets, squares and places, by the lines of elevated and surface railroad owned, leased and operated by it." This tax is to be distributed among the different cities and towns where the company is operating upon a mileage basis. Then follows the provision of section 19, that the locations of the company and its right to maintain its elevated structure "shall not be subject to revocation" except under the general right of the Commonwealth to purchase or to take by right of eminent domain. Only locations not built upon within ten years are excepted from this enactment. Subsequently, in section 21, it is enacted that the general laws concerning revocation of street railway locations shall not apply to this company.

In my opinion these provisions were intended to and did in fact create a contract between the Commonwealth and the Boston Elevated Railway Company. By accepting the provisions of this statute and acting thereon the company contracted to pay, for a period of twenty-five years, a special franchise tax in addition to the burdens imposed upon other railways occupying public highways, and this payment was expressly declared to be compensation "for the use and occupation of the public streets, squares and places." The Commonwealth, on its part, expressly obligated itself to exempt the company from the general laws relating to the alteration and revocation of locations of street railways, and formally

covenanted that "the locations of or right to maintain any elevated lines or structures of the Boston Elevated Railway Company shall not be subject to revocation." The only right expressly reserved by the Commonwealth was its right under the general railroad laws then in force to purchase or to take by eminent domain for fair compensation all the franchises and property of any railroad. I am confirmed in my conclusion that these provisions gave rise to a contract by an opinion rendered by my predecessor, Hon. Dana Malone, on Dec. 6, 1909, and printed as a part of House Document No. 2116 for the year 1914. Other aspects of section 10, already referred to, have several times been held by former Attorneys-General to constitute a contract between this company and the Commonwealth. II. Op. Atty.-Gen. 261; II. Op. Atty.-Gen. 426; III. Op. Atty.-Gen. 400.

Whether this contract of the Commonwealth not to revoke these locations and rights is to be regarded as limited to a period of twenty-five years from June 10, 1897, the date of the approval of the act of 1897, need not now be considered. At least for that period of time the Commonwealth has made a binding contract not to revoke the locations of the Boston Elevated Railway Company or its right to maintain any elevated lines or structures authorized by that act.

The erection of the elevated structure across the locations of the Boston & Albany Railroad Company and the New York, New Haven & Hartford Railroad Company, under authority of the act of 1897, and the payment to them as required by section 7 of compensation for the right to maintain and operate it, in my opinion created in the Boston Elevated Railway Company an easement, or a right in the nature of an easement, in the property of the railroads. This right is property of the Boston Elevated Railway Company, and it cannot be deprived of that property by the Commonwealth without compensation. In my opinion the proposed bill, if enacted, would be unconstitutional upon this ground, so far as it applies to the structure of the company located across the rights of way of these two railroads.

So far as the Boston Elevated Railway Company is maintaining any part of this structure on its own private land, it stands in the same position as any other landowner. It may use its own property and erect such structures thereon as it pleases, free from any interference by the Commonwealth except under the police power for the preservation of the public health, safety or morals.

There remains the question applicable to all portions of the structure described in the bill, whether, notwithstanding the foregoing considerations, the General Court may order it removed without compensation under the police power. Under that power the Legislature may impose any reasonable restraint upon the use of property for the purpose of protecting the public health, safety or morals. The Legislature cannot contract away its right to exercise this power, and in my opinion it has not attempted to do so in this instance. Under the guise of exercising the police power it cannot disregard its contract nor recall its grant of a right to maintain elevated structures on these authorized locations. Yet it is within its power, notwithstanding its contract with this company, to enact such laws with reference to any part of the elevated structure of this corporation, particularly those portions located in public highways, as shall be reasonably adapted to the preservation of the public health and safety, and as shall insure the maintenance and operation of this railway system without risk of injury to the public. Such legislation is in no proper sense a revocation of the location.

This bill, however, does not purport to be in the interest of the public safety. Apparently the structure is declared by the bill to be obsolete only in the sense that it is no longer used. There is no suggestion that it is dangerous or out of repair, and I do not understand that any such suggestion can be fairly made. The general statement that it is detrimental to the public welfare is too vague and indefinite a recital to warrant the taking of the property of this corporation without compensation. If the police power can ever be exercised solely in the interest of the public welfare, it must be in some re-

stricted meaning of that term closely related to the public health, safety or morals. Property cannot be taken without compensation merely in the interest of the artistic or æsthetic sense of the community. See *Commonwealth v. Boston Advertising Co.*, 188 Mass. 348.

The bill also recites that this structure is a menace to the public health. It must be assumed that this statement is made in good faith, yet to sustain the bill as an exercise of the police power on this ground it must appear reasonably to be directed toward that end. In the first instance the General Court is to be the judge of what is reasonable, but its action is reviewable by the courts, and if they determine that there can be no reasonable relation between a given enactment and the protection of the public health, they will not sustain the law. I am unable to perceive how the mere maintenance of that portion of the structure in question which is not located in public highways can be a menace to the public health. The fact that this structure is not now in use appears to render its maintenance upon private land, if anything, less dangerous to the public health rather than more so. So far as it is so located it is largely at or below the level of the ground, and thus there is provided in a tenement-house district an open space which might otherwise be covered by buildings. I am unable to perceive any real connection between the preservation of the public health and the requirement that the Boston Elevated Railway Company remove this entire structure.

For the foregoing reasons it is my duty to advise the Senate that the bill printed as House Document No. 1271, if enacted, would be unconstitutional.

The question addressed to me by the order of the honorable Senate appears to be broader in its scope than the proposed bill. Accordingly, I deem it my duty in answering the inquiry to make some further suggestions as to the power of the General Court to deal with a portion of the elevated structure of the Boston Elevated Railway Company described in the order.

Public highways are created and maintained for public purposes. Ordinarily it is not within the power of the Legislature, so long as they are maintained as highways, to devote them to private uses which interfere with the rights of the public. Thus, the justification for the grant to a railway corporation of locations in public highways, whether revocable or irrevocable, is that these locations are to be used in the public interest. The locations granted to the Boston Elevated Railway Company in public highways, and the right to maintain elevated structures therein, were granted to it solely on the ground that it is a public service corporation, and that it was to use those locations and rights primarily in the public interest as an instrumentality of the public service. These grants were, therefore, charged with a trust. The locations and the right to maintain and operate structures thereon were subject to an implied limitation that they were to be used in the public service. The contract not to revoke them was subject to an implied condition or agreement that the company should continue to use them solely for the purposes for which they were granted.

Furthermore, as I have already suggested, the Boston Elevated Railway Company holds its locations and the rights granted to it by its contract with the Commonwealth subject to the exercise of the police power. In my opinion no Legislature, under the guise of entering into a contract, can tie the hands of its successors so as to prevent the exercise of this power to its fullest extent.

I am informed that the Washington Street tunnel was opened in November, 1908, and that since that time, or for nearly six and one-half years, the elevated structure referred to in the order has not been used by this company. It no longer has any physical connection with the Tremont Street subway, and since the widening of Pleasant Street it would be necessary to excavate a tunnel under that street in order again to connect this structure with the Tremont Street subway. I am informed that no plan is now under consideration or in contemplation which involves again using the Tremont Street

subway for elevated trains, or using of any part of the elevated structure in question as a part of any scheme of rapid transit. So far as I am informed, no definite future use of this structure has ever been suggested. Though it has been unused for nearly six and one-half years, so far as I am informed the Boston Elevated Railway Company has made no suggestion to the General Court or to the Boston Transit Commission involving its use at any time in the future as a part of its elevated railway system. Apparently no practical use of this unused structure can be made without the grant by the General Court of further locations to be used in connection with it.

Under these circumstances, and in view of the nature of the rights of this company in public highways, I am of opinion that it is within the constitutional power of the General Court,^x upon consideration of such facts as I have suggested, and any other facts bearing upon the matter that may be brought to its attention, to conclude that the Boston Elevated Railway Company has discontinued or abandoned the use of that portion of its structure under consideration which is within the limits of public ways; that this structure is and can be of no further public use; that it unreasonably interferes with enjoyment and use of the public ways by the public to the detriment of the public health and safety; and by appropriate legislation to require that company, at its own expense and without compensation,^y to remove such structure. Such an enactment would, in my opinion, be a valid regulation of the use of these public highways in the interest of the public health and the public safety under the police power.

CONSTITUTIONAL LAW — RELIGIOUS BELIEF OF PUBLIC SCHOOL
TEACHERS — BILL FORBIDDING INQUIRY BY SCHOOL
OFFICIALS.

A provision of a proposed act making it "unlawful for any public school committee or superintendent or supervisor of public schools to require or solicit from an applicant for a position in the public schools any information as to the religious belief or practice of the applicant" is not unconstitutional as inconsistent with Article II. of the Declaration of Rights, declaring "it is the right as well as the duty of all men in society, publicly, and at stated seasons, to worship the SUPREME BEING, the great Creator and Preserver of the universe," as that declaration is merely a precept for the guidance of the people and their legislators in the performance of their public duties, and not a limitation on the power of the General Court.

A provision of a proposed act making it "unlawful for any public school committee or superintendent or supervisor of public schools . . . to furnish any information as to the religious belief or practice of any applicant for a position in any public school" would be unconstitutional if enacted, as it covers statements made outside of official duties, and thus denies to the officers referred to the equal protection of the laws.

If from this proposed act the words "or to furnish any information as to the religious belief or practice of any applicant for a position in any public school" be struck out, and the words "and no appointment to such position shall be affected by political or religious opinions or affiliations" inserted, as thus amended it is not beyond the constitutional power of the General Court.

To the House
of Representatives.
1915
May 3.

I have the honor to acknowledge the receipt of an order from the House of Representatives, in the following form: —

Ordered, That the Attorney-General be requested to inform the House of Representatives whether, in his opinion, House Document No. 1962, now pending, being a bill relative to applicants for positions in the public schools, would be constitutional if amended, in section 1, by striking out, in lines 5, 6 and 7, the words "or to furnish any information as to the religious belief or practice of any applicant for a position in any public school," and inserting in place thereof the words "and no appointment to such a position shall be affected by political or religious opinions or affiliations."

Ordered, That a copy of House No. 1962, together with a copy of the amendment, be transmitted to the Attorney-General for his information.

Section 1 of the proposed bill, unamended, is as follows: —

It shall be unlawful for any public school committee or superintendent or supervisor of public schools to require or solicit from an applicant for

a position in the public schools any information as to the religious belief or practice of the applicant, or to furnish any information as to the religious belief or practice of any applicant for a position in any public school.

On April 12 I addressed a communication to the chairman of the Committee on Bills in the Third Reading of the House, concerning House Bill No. 1962, a copy of which communication is as follows:—

I have your letter of April 1 requesting me to inform your committee if in my opinion House Bill No. 1962, relative to applicants for positions in public schools, would be constitutional if enacted into law.

When this bill in its original form was considered by me at the request of your committee, it contained a provision making it applicable to any person, firm or corporation conducting a teacher's agency. That provision, in my opinion, rendered the bill unconstitutional, and I so informed your committee. I then had no occasion to consider any other phase of the bill.

Article II. of the Declaration of Rights of the Constitution of the Commonwealth declares—

It is the right as well as the duty of all men in society, publicly, and at stated seasons, to worship the SUPREME BEING, the great Creator and Preserver of the universe. And no subject shall be hurt, molested, or restrained, in his person, liberty, or estate, for worshipping God in the manner and season most agreeable to the dictates of his own conscience; or for his religious profession of sentiments; provided he doth not disturb the public peace, or obstruct others in their religious worship.

When religious tests as qualification for office were removed from our Constitution at an early date (see Amendments, Article VII., adopted April 9, 1821), this declaration was left unmodified. It has long been a guiding principle in our school laws. R. L., c. 42, provides:—

SECTION 18. The president, professors and tutors of the university at Cambridge and of the several colleges, all preceptors and teachers of academies and all other instructors of youth shall exert their best endeavors to impress on the minds of children and youth committed to their care and instruction the principles of piety and justice and a sacred regard for truth, love of their country, humanity and universal benevolence, sobriety, industry and frugality, chastity, moderation and temperance, and those other virtues which are the ornament of human society and the basis upon which a republican constitution is founded; and they shall endeavor to lead their pupils, as their ages and capacities will admit, into a clear understanding of the tendency of the above-mentioned virtues to preserve and perfect a republican constitution and secure the blessings of liberty as well as to promote their future happiness, and also to point out to them the evil tendency of the opposite vices.

SECTION 19. A portion of the Bible shall be read daily in the public schools, without written note or oral comment; but a pupil whose parent or guardian informs the teacher in writing that he has conscientious scruples against it, shall not be required to read from any particular version, or to take any personal part in the reading. The school committee shall not purchase or use school books in the public schools calculated to favor the tenets of any particular religious sect.

The bill before me, if enacted into law, would make it a criminal act for the officials in charge of our public schools to seek from any applicant for a position as teacher any information whatever as to his religious belief or practice. It would thus be a misdemeanor for any such official to inquire of an applicant whether he believes in or worships the SUPREME BEING, or to ask him whether or not he is an atheist. Undoubtedly the Legislature has ample power to prevent and to punish discrimination in any form against any person on account of the manner of his worship or the form of his religious professions. It is conceded that many restraints may be imposed upon public officers in the performance of their public duties which may not be imposed upon citizens in general. Yet it is suggested that the positive declaration of the first sentence of Article II. of the Bill of Rights, that it is a duty of all men to worship the SUPREME BEING, cannot be disregarded. It is, therefore, urged that the General Court has no power to deny to school authorities the right to inquire from applicants for positions as teachers in public schools whether or not they perform the fundamental religious duty thus recognized and emphasized by the Declaration of Rights.

The question as to what effect is to be given to this clause of the Constitution and to other similar provisions (see Part I., Article XVIII.; Amendments, Article XI.) is by no means free from doubt. The judges of the Supreme Judicial Court have recently declared —

The Constitution of the Commonwealth in several clauses inculcates the practice of religion and urges the public worship of God, as essential means for the perpetuation of republican institutions. *Opinion of the Justices*, 214 Mass. 599, 601.

It may be argued with considerable force that it is beyond the power of the General Court to enact laws which are at variance with the principles declared by the Constitution to lie at the foundation of our institutions. On the other hand, however, it can be argued with equal force that such declarations as those under consideration were intended not as limitations on the power of the Legislature, but rather as precepts set before our people and their legislators as guides in the performance of their public duties; that these precepts are directory and not mandatory, and that thus the General Court is the sole judge as to how far it may properly enact legislation not in conformity with them. On the whole, in view of the fact that there are no express words of prohibition upon the power of the Legislature in this regard, I am inclined to this latter

view. It follows, in my opinion, that the only express limitation upon legislative power is that contained in Article II. of the Declaration of Rights, forbidding discrimination on the ground of religious beliefs or practices. I do not feel warranted in advising you that the bill in question, if deemed expedient, would be nullified by this clause of the Constitution.

Another feature of the bill must be considered. If enacted it would make it a misdemeanor, punishable by fine, for the school officers mentioned "to furnish any information as to the religious belief or practice of any applicant for a position in any public school." This clause seems to be broad enough to include any statement, made in ordinary private conversation, of any fact, whether learned officially or otherwise, connected with the religious belief or practice of any such applicant, however harmless or innocent such statement might be or whatever might be the purpose of making it. This seems to me to be something quite different from prescribing the manner in which these public officers shall perform their public duties. In my opinion this provision, if enacted, would deny to these officers the equal protection of our laws within the meaning of the Fourteenth Amendment to the Constitution of the United States. For this reason House Bill No. 1962 would, in my opinion, be unconstitutional if enacted into law.

The proposed amendment set forth in the order removes from the bill the clause which, in my opinion, would render it unconstitutional if enacted without amendment. The provision substituted by the proposed amendment does not appear to me to be subject to criticism upon constitutional grounds.

I fully stated my views as to the constitutionality of the remaining provisions of the bill in the opinion which I have quoted. Those views I still retain. Article II. of the Declaration of Rights has firmly established in our fundamental law the principle that no discrimination based upon religious beliefs or practices shall be permitted. The proposed bill, if amended as suggested in the order, affirms that principle and extends its application to persons having no religious beliefs. For the reasons stated in the opinion rendered by me to the Committee on Bills in the Third Reading the enactment of such a bill, if deemed expedient, is not, in my opinion, beyond the constitutional power of the General Court.

CONSTITUTIONAL LAW — REGULATION OF MOTOR VEHICLES —
CLASSIFICATION — REQUIREMENT OF A BOND.

A proposed act requiring every person, firm or corporation engaging in the business of carrying or transporting passengers for hire in any motor vehicle to obtain a license from municipal authorities and to give a bond conditioned to pay any judgment obtained against the licensee for injury to person or property by reason of acts of the licensee in the conduct of such business, and then exempting from the provisions of such act persons operating motor taxicabs or motor vehicles rented by the day or hour and also any person, firm or corporation engaged principally in the hotel business, who operate motor vehicles to transport guests to and from railroad stations, would be unconstitutional if enacted.

To the House
of Repre-
sentatives.
1915
May 4.

The House of Representatives has requested my opinion as to whether "the provisions of House Bill No. 2042, now pending, relative to the use of certain motor vehicles for the transportation of passengers, are constitutional and legal, having special reference to the provision in the first section requiring the furnishing of a bond as a condition of receiving a license to operate certain motor vehicles, and also having special reference to the provisions in the fourth section which discriminate for the purposes of the bill between different classes of motor vehicles, or between motor vehicles used for different purposes, and between different classes of common carriers of passengers."

The important sections of the proposed act are as follows: —

SECTION 1. Every person, firm or corporation engaging in the business of carrying or transporting passengers for hire in any motor vehicle, as defined in chapter five hundred and thirty-four of the acts of the year nineteen hundred and nine, shall, before engaging in such business, make application to the board of aldermen in a city, or, in cities having no board of aldermen, to such city authority as may exercise the functions of such board, and to the selectmen in a town, and in the city of Boston to the board of street commissioners, for a permit to conduct such business. No permit for the conduct of such business shall be issued until the applicant has filed with the clerk of the city or town where it is proposed to engage in such business, or, if the business is to be conducted in more than one city or town, then with the clerk of one of such cities or towns, a bond running to the commonwealth of Massachusetts, in such penal sum, not less than two thousand dollars for each motor vehicle operated

as said aldermen or corresponding board of selectmen shall require, with such surety company, licensed to do business in this commonwealth, or with such other sureties as said aldermen or corresponding board of selectmen may approve, conditioned to pay any judgment obtained against the principal named in said bond for any injury to person or property by reason of any careless, negligent or unlawful act on the part of the principal named in said bond, his agents or employees, or the driver of such motor vehicle, in the conduct of said business or in the operation of such vehicle: *provided, however*, that nothing herein contained shall deprive the defendants in any such action of the right, given by chapter five hundred and fifty-three of the acts of the year nineteen hundred and fourteen, to set up and prove the affirmative defense of contributory negligence on the part of the person injured or killed.

SECTION 4. This act shall take effect on the first day of July next, but shall not apply to owners or drivers of motor taxicabs, so called, or to motor vehicles rented by the day or hour, with or without a driver, to an individual or party of individuals for a special occasion, or to motor vehicles performing a service similar to that formerly performed by horse-drawn public cabs and hackney coaches, nor to any person, firm or corporation engaged principally in the hotel business, who operates motor vehicles to transfer guests to and from the railroad station.

The provisions of the act requiring the licensing of motor vehicles used for the transportation of passengers for hire would seem to be well within the police power. Laws requiring licenses before engaging in certain businesses especially affecting public interests are so numerous that discussion of this point appears unnecessary. The fact that motor vehicles and the operators thereof are already under the necessity of obtaining licenses does not prevent the Legislature from requiring other and special licenses for their use in such a public business as transporting passengers for hire. *Commonwealth v. McGann*, 213 Mass. 215.

The requirement that a bond shall be filed as a condition precedent to the issuance of a license is also a common requirement, the constitutionality of which would hardly now be questioned. Similar provisions will be found on the statute books already as to liquor dealers (R. L., c. 100, § 42), money lenders (R. L., c. 102, § 59), ferrymen (R. L., c. 55, § 1),

pawnbrokers (R. L., c. 102, § 40), private detectives (R. L., c. 108, § 36) and auctioneers (R. L., c. 64, § 4).

The mere fact that the provisions of the act apply to common carriers of passengers by motor vehicles and not to common carriers operating by other means, in my judgment does not render the provisions of section 1 of the act unconstitutional.

The question, then, remains as to whether any of the exceptions contained in section 4 of the proposed act are such as to render it, as a whole, unconstitutional as class legislation, or, in other words, as denying to all persons the equal protection of the laws.

Even before the adoption of the Fourteenth Amendment it was a settled principle of constitutional law that statutes in regard to the transaction of business must operate equally upon all citizens who desire to engage in the business, and that there shall be no arbitrary discrimination between different classes of citizens. *Commonwealth v. Hana*, 195 Mass. 262, 266.

The basis upon which classification is admissible is well stated by Harlan, J., in *Connolly v. Union Sewer Pipe Co.*, 184 U. S. 540, 560: —

The difficulty is not met by saying that, generally speaking, the State when enacting laws may, in its discretion, make a classification of persons, firms, corporations and associations, in order to subserve public objects. For this court has held that classification "must always rest upon some difference which bears a reasonable and just relation to the act in respect to which the classification is proposed, and can never be made arbitrarily and without any such basis. . . . But arbitrary selection can never be justified by calling it classification. The equal protection demanded by the Fourteenth Amendment forbids this. . . . No duty rests more imperatively upon the courts than the enforcement of those constitutional provisions intended to secure that equality of rights which is the foundation of free government. . . . It is apparent that the mere fact of classification is not sufficient to relieve a statute from the reach of the equality clause of the Fourteenth Amendment, and that in all cases it must appear not only that a classification has been made, but also that it is one based upon some reasonable ground, — some difference which bears a just and proper relation to the attempted classification, — and is not a mere arbitrary selection."

While the class which is to be regulated may properly be defined by describing a larger group and then excepting therefrom certain distinct classes, provided there is a reasonable ground for the exceptions, the fact that ready language has not suggested itself for defining such class by itself in such a way as to make exception unnecessary naturally raises a doubt as to whether in reality a reasonable distinction exists. In other words, if a reasonable ground for creation of a class exists, it seems to follow that that class could be clearly and directly described, without the indirect definition of the class by means of exceptions.

As stated in the language quoted above, the distinction must be with reference to the purposes of the act. The requirement in House Bill No. 2042, of filing a bond, has for its object the assurance of financial ability to respond in damages for injuries for which the owner is liable, and a distinction, to be valid, must have some relation to the danger or risk. So far as the act exempts persons, firms or corporations "engaged principally in the hotel business, who operate motor vehicles to transfer guests to and from the railroad station," there is, in my opinion, no reasonable ground of distinction.

The act would penalize a hotel keeper who operated such a vehicle to and from a steamboat wharf or other place while exempting a person in exactly the same situation who operated one to and from a railroad station. Furthermore, it is difficult to see how the operation of such a motor vehicle between a hotel and a railroad station would be any less dangerous to the public or to the passengers if operated by or under the direction of a person engaged principally in the hotel business than the same vehicle operated in the same manner by a person whose principal business was that of banking or anything else, but who also was engaged in the conduct of a hotel.

It is true that some courts, in their desire to uphold the constitutionality of acts of Legislatures, have gone to extraordinary lengths, and have found distinctions justifying classifications which are not apparent to the average citizen, but

I cannot believe that in Massachusetts the Supreme Judicial Court will ever go to such lengths as to uphold a classification such as this.

In my opinion the provision of the Constitution that no State shall "deny to any person the equal protection of the laws" is one the firm adherence to which is most necessary to the foundations and preservation of a republican form of government; and no discrimination should be supported between different citizens unless in fact a substantial ground therefor can be stated without resort to fanciful arguments or attenuated distinctions.

Undoubtedly, the Legislature may draw lines which relate to the liability of accident. If the classification proposed were along the line of the number of passengers carried, the size or power of the vehicle, the rate of speed at which it may be operated or the skill of the person operating it, the nature of the district through which it operates, the control of the operator by the passenger, or related to common carriers of passengers by motor vehicles, of whom the degree of care required could be said to be greater than of others, the distinction could well be supported. But, in my opinion, unless some reason along lines similar to those suggested exists, an exception from such a class as is defined in section 1 of this act is not warranted.

Accordingly, I am of the opinion that the provisions of House Bill No. 2042, if enacted into law, would be unconstitutional

FIRE PREVENTION — STORAGE OF INFLAMMABLE FLUIDS — STRUCTURES.

A can is not a structure within the meaning of St. 1904, c. 370, § 3, as amended by St. 1913, c. 452, providing that "no building or other structure shall be used in any city or town" for the storage of inflammable fluids without license.

To the Fire
Prevention
Commissioner.
1915
May 6.

"Is a can a structure under the provisions of St. 1904 c. 370, § 3, as amended by St. 1913, c. 452?" Such is the question submitted by you for my opinion.

The law referred to, briefly stated, is, "No building or other structure shall be used in any city or town for the keeping, storage, etc., of any articles named in section two (including gasoline), unless" a license is granted, etc.

A "structure" is defined to be "a building of any kind, but chiefly a building of some size and magnificence; an edifice." . . . While the word "structure" may cover a great variety of form and construction, yet, when used in connection with the words "house" and "building," it is evidently intended to simply describe a variety of building. *Conley v. Lackawanna Iron & Steel Co.*, 88 N. Y. Supp. 125.

The above definition seems to be the construction adopted in most jurisdictions. While it is not necessary to go to that length in the determination of this question, it is my opinion that a can is not a structure within the meaning of the act.

FIREMEN'S RELIEF FUND — PERSONAL INJURIES — EFFECT OF EXPOSURE IN COURSE OF DUTY.

A fireman disabled by congestion of the kidneys which is caused by exposure to cold and stormy weather encountered in the performance of his duties at a fire, is entitled to the benefits of R. L., c. 32, § 73, providing that the firemen's relief fund "shall be used for the relief of firemen . . . who may be injured in the performance of their duty at a fire or in going to or returning from the same."

I am requested to review an opinion given by a former Attorney-General in answer to the following inquiry presented by your board: —

To the Board
of Commis-
sioners of
Firemen's
Relief Fund.
1915
May 6.

Is a fireman entitled to a benefit under chapter 32, sections 71-77 who can reasonably prove that he was in practically perfect health up to the time of responding at about midnight to a third or fourth alarm fire, the night in question being very cold and sleety, and it being the kind of a fire that entailed much standing around and but little work, and under these conditions the kidneys became congested, with the result that the man was laid up for several months, and may not ever become quite well again. Is this fireman eligible to benefits under the chapter and specifications above mentioned?

The law which applies to such cases is R. L., c. 32, § 73, as amended by St. 1903, c. 253, § 1, and is as follows:—

SECTION 73. Such fund shall be used for the relief of firemen, whether members of said association or not, who may be injured in the performance of their duty at a fire or in going to or returning from the same, and for the relief of the widows and children of firemen killed in the performance of such duty, in the manner and to the amount determined by a board of five persons, of whom three, not members of said association, shall be appointed by the governor in July of the year nineteen hundred and three, to serve, one for three years, one for two years, etc.

The opinion referred to was to the effect that the firemen's relief fund should be used only in cases of injuries received by some form of external violence, and the above inquiry was answered in the negative. Since this opinion was rendered similar questions have arisen under the workmen's compensation act, and the construction of that act by various tribunals and courts would seem to have a strong bearing on the question presented by your board. The similarity in the wording of the law governing the distribution of the fund in your hands and the compensation act above referred to will be seen at a glance.

Section 1 of Part II. of the workmen's compensation act reads, in part, as follows:—

If an employee . . . receives a personal injury arising out of and in the course of his employment, he shall be paid compensation by the association as hereinafter provided. . . .

The Industrial Accident Board has defined "personal injury" as used in the workmen's compensation act as "any injury or damage or harm or disease which arises out of and in the course of the employment which causes incapacity for work and takes from the employee his ability to earn wages."

Among the many cases arising under the act referred to which have been decided in favor of the employee are the following: *Stone v. Travelers Insurance Co.*, where an employee got his feet wet in a leaky boat which was furnished

by his employer, and pneumonia developed as an after-effect of the injury; *Milliken v. Travelers Insurance Co.*, where an employee contracted pneumonia following cold and exposure.

The Supreme Judicial Court in the case of *Brightman v. Etna Insurance Co.*, 220 Mass. 17, upheld a decree in favor of the widow of an employee who died of heart disease which was accelerated by the excitement attending the sinking of a vessel on which said employee was cook, and from which he made his escape and died soon after reaching the shore.

In none of these cases, it will be observed, was there "external violence" in the ordinary use of the term, and yet in each instance it was held that there had been personal injury. In view of these cases and similar cases in other jurisdictions, nearly all of them having been decided since your inquiry was first raised, I am of the opinion that if the injury to which your communication refers was in fact really caused by exposure while the fireman was actually in the performance of his duties he is entitled to the benefits of the act.

I therefore feel obliged to modify the ruling previously made by this department, and to inform you that in my opinion the funds of your association may properly be devoted to the relief of firemen who may be injured in the performance of their duties at a fire or in going to or returning from the same, whether the injuries are caused by "external violence," from smoke or fire inhaled, from exposure, or from any disease directly resulting from the performance of their duties.

In your letter of April 28 you also ask whether firemen injured in fire service who are receiving benefits under the workmen's compensation act have a right to receive a benefit under St. L., c. 32, §§ 71-77. I am of the opinion that the question should be answered in the negative. St. 1913, c. 807, § 5, in my judgment, clearly prohibits any such payment.

INTOXICATING LIQUORS — TRANSPORTATION INTO NO-LICENSE MUNICIPALITIES — TIME FOR GRANTING PERMITS.

St. 1906, c. 421, § 2, as amended by St. 1911, c. 423, does not limit to the month of April the time in which municipal authorities may grant permits for the transportation of intoxicating liquors into no-license cities and towns, and such authorities have the power in their discretion to grant such permits throughout the year.

To the District
Attorney for
the Northern
District.
1915
May 11.

I beg to acknowledge the receipt of your letter in which you request my interpretation of the provisions of chapter 423 of the Acts of 1911. You ask me to inform you "whether or not the mayor and board of aldermen may grant permits referred to by the law in any other month except the month of April referred to in the statute."

The provisions of chapter 423 of the Acts of 1911 amend section 2 of chapter 421 of the Acts of 1906, so as to read as follows: —

The mayor and aldermen in cities and the selectmen in towns in which said licenses of the first five classes are not granted shall annually in the month of April, grant and issue one or more permits under the provisions of this act, to become effective on the first day of May following, and to be granted only to a person, firm or corporation regularly and lawfully conducting a general express business and to no other person, firm or corporation, and every such permit shall specify the residence by street and number (if any) of the holder, and shall be subject to all laws now or hereafter in force relative to the transportation of such liquors.

Section 1 of said chapter 421 is as follows: —

No person or corporation, except a railroad or street railway corporation, shall, for hire or reward, transport spirituous or intoxicating liquors into or in a city or town in which licenses of the first five classes for the sale of intoxicating liquors are not granted, without first being granted a permit so to do as hereinafter provided.

Prior to the passage of this statute there were no restrictions placed upon the transportation of intoxicating liquors into no-license communities other than those imposed by sections 48 to 51 of chapter 100 of the Revised Laws.

Chapter 421 was enacted for the purpose of regulating the

transportation for hire or reward of intoxicating liquors into no-license communities, and of requiring a permit by the mayor and aldermen or the selectmen to the person so transporting. The act imposes a limitation upon the right of citizens to engage in a business which they formerly could lawfully engage in, and therefore the limitations contained therein should be construed strictly. Section 2 was enacted for the purpose of insuring to the inhabitants of the no-license community that there should be at least one person or corporation authorized under the act to transport such liquors into it. *Rea v. Aldermen of Everett*, 217 Mass. 427.

After the passage of chapter 421 of the Acts of 1906 there were many boards of mayor and aldermen and boards of selectmen which took the attitude that the word "shall," in section 2 of said chapter 421, should be read as "may," and therefore it was discretionary with them whether to grant one or more permits, and also that, as section 2 did not provide the time when the permit should be granted, it was discretionary with them as to the time the permit should be granted, even if the provisions of said section 2 required them to grant at least one such permit. Chapter 423 of the Acts of 1911 was passed, in my opinion, to give further force and effect to section 2 of chapter 421 of the Acts of 1906, so as to require the mayor and aldermen of a city and the selectmen of a town to grant at least one permit during the month of April.

I am of the opinion that outside of the mandatory provision in section 2, directing the mayor and aldermen in cities and the selectmen in towns to grant and issue at least one permit in the month of April, and the provision that the permits shall be granted only to a person, firm or corporation regularly and lawfully conducting a general express business, the act in no way limits or controls the discretionary powers vested in the mayor and aldermen or the selectmen, and that they therefore have the power at any time during the year to grant permits in addition to those granted during the month of April.

It is to be noted that a construction that the mayor and aldermen in cities and selectmen in towns were limited to

granting permits in the month of April only might lead, in view of the decision in *Rea v. Aldermen of Everett*, to absurd results, as the mayor and aldermen or selectmen could not be compelled to grant a permit until the expiration of the month of April, and after its expiration they would have no authority to grant such permit.

REGISTERED PHYSICIANS — APPLICATION OF STATUTE REQUIREMENT TO STATE INSTITUTIONS — ASSISTANTS TO SUPERINTENDENTS.

Assistants to superintendents in State institutions, if practising or attempting to practise medicine in any of its branches, must be duly registered in accordance with the requirements of R. L., c. 76, §§ 1-9.

To the Board
of Registration
in Medicine.
1915
May 13.

You have requested my opinion as to whether physicians practising medicine in State institutions as assistants to the superintendents thereof are required to be registered under the Massachusetts laws; or, in other words, whether an unregistered person so practising is acting contrary to the statutes.

R. L., c. 76, §§ 8 and 9, provide:—

SECTION 8. Whoever, not being lawfully authorized to practice medicine within this commonwealth and registered as aforesaid, holds himself out as a practitioner of medicine, or practices or attempts to practice medicine in any of its branches, . . . shall, for each offence, be punished by a fine of not less than one hundred nor more than five hundred dollars or by imprisonment for three months, or by both such fine and imprisonment. In a case in which a provision of this or the preceding section has been violated, the person who committed the violation shall not recover compensation for services rendered.

SECTION 9. The provisions of the eight preceding sections shall not be held to discriminate against any particular school or system of medicine, to prohibit medical or surgical service in a case of emergency, or to prohibit the domestic administration of family remedies. They shall not apply to a commissioned medical officer of the United States army, navy or marine hospital service in the performance of his official duty; to a physician or surgeon from another state who is a legal practitioner in the state in which he resides, when in actual consultation with a legal practitioner of this commonwealth; to a physician or surgeon residing in another state and legally qualified to practice therein, whose general

practice extends into the border towns of this commonwealth, if such physician does not open an office or designate a place in such towns where he may meet patients or receive calls; to a physician authorized to practice medicine in another state, when he is called as the family physician to attend a person temporarily abiding in this commonwealth; nor to registered pharmacists in prescribing gratuitously, osteopaths, pharmacists, clairvoyants, or persons practicing hypnotism, magnetic healing, mind cure, massage, Christian science or cosmopathic method of healing, if they do not violate any of the provisions of section eight.

Section 8 imposes a penalty upon any person who practises or attempts to practise medicine without being registered. It is frequently stated as a maxim of the law that statutes do not apply to the State or sovereign unless it is expressly mentioned. There are, however, many exceptions to this rule, and these exceptions have often been grouped under a general statement such as appears in Bacon's Abridgment (title "Prerogative," 3-5), where it is said:—

The general rule is, that where an act of parliament is made for the public good, the advancement of religion and justice, and to prevent injury and wrong, the king shall be bound by such act, though not particularly named therein. But where a statute is general, and thereby any prerogative, right, title, or interest is devested, or taken from the king, in such case he shall not be bound; unless the statute is made by express words to extend to him. Quoted in *United States v. Knight*, 14 Pet. 315.

In Endlich on Interpretation of Statutes (§ 167) it is said:—

The test, therefore, in every case in which the question whether or not the government is included in the language of a statute has to be met and determined, cannot be a mere general rule, either one way or another, arbitrarily applied, but must be the object of the enactment, the purposes it is to serve, the mischiefs it is to remedy, and the consequences that are to follow,—starting with the fair and natural presumption that, primarily, the Legislature intended to legislate upon the rights and affairs of individuals only. This is the only proper extent and application of the rule against inclusion of government.

The statute as to registration of physicians does not in terms impose any penalty or obligation upon the employer, but ap-

plies rather to the person who attempts to practise medicine. Any effect upon the State by its general enforcement in all cases, including employees in public institutions, would be merely an indirect result of such enforcement.

The object of these statutes is, of course, the promotion of the public good and the protection of the citizens against the evils naturally resulting from the attempts of unskilled persons to practise medicine. No good reason suggests itself why the protection thus afforded should be less to those citizens who are cared for in State institutions than to those who are not.

I am of the opinion that R. L., c. 76, § 8, is general in its application and applies to all persons without regard to whether they are employed in State institutions or elsewhere.

The question, of course, will arise in each particular case as to whether the individual in question is or is not holding himself out as a practitioner of medicine or practising or attempting to practise medicine in any of its branches. Many doubtful cases may occur, and no hard and fast rule for their decision can be laid down. The mere question of whether or not the person prescribes drugs does not furnish a conclusive test, as one may practise medicine without so doing. *Commonwealth v. Jewelle*, 199 Mass. 558. The diagnosis or attempt at diagnosis and decision that no drugs are necessary may be as dangerous to the patient as an unwise prescription.

As was said by the Supreme Judicial Court in *Commonwealth v. Porn*, 195 Mass. 443, 446, where a midwife was charged with violating this statute, it would "ordinarily be a question of fact" whether the ministrations are those "of a physician or whether of an attendant nurse and helper."

Doubtless many assistants are assigned and perform duties which do not require or cause them to practise medicine, while others may be found who are so practising. The decision as to each case must be arrived at with a knowledge of all the facts and a wise judgment as to whether a person is practising or attempting to practise medicine.

CIVIL SERVICE — GRADE OF STENOGRAPHERS AND CLERKS —
PROMOTIONS — INCREASE OF SALARIES.

Under St. 1914, c. 605, entitled "An Act to establish grades for the salaries of clerks and stenographers employed in the departments of the Commonwealth," a head of a department may promote a clerk or a stenographer for positive merit from a lower grade to a higher grade without limitation. When a clerk or a stenographer is assigned to a grade by promotion or original appointment, by section 3 of this statute he or she may be put, by the head of the department, at the second or third years of the grade in exceptional cases; but within the grades established by this statute the salary of a clerk or a stenographer cannot be increased by more than an annual increment of \$50 without the approval of the Governor and Council, as provided in section 5.

I beg to acknowledge your letter requesting my opinion in regard to certain questions which have arisen as to when and by what processes heads of departments may in special cases increase the salaries of clerks and stenographers by larger yearly increments than \$50.

To the Auditor
of the Common-
wealth.
1915
May 14.

Chapter 605 of the Acts of 1914 established grades for salaries of clerks and stenographers employed in the departments of the Commonwealth and provided that thereafter appointments and increases in salary should be made only in accordance with the provisions of that act. Section 9 provided that heads of departments should, before Dec. 1, 1914, grade stenographers and clerks in their employ in accordance with the provisions of that act.

In my opinion this last-mentioned section contemplated that before the date mentioned all clerks and stenographers should be placed by the head of a department in one of the three grades established by the act, and with such position within the grade as he might determine. If no such grades were expressly established, in my opinion these employees at that date automatically went into the grades which the salaries then being paid to them indicated. At that time the status of the clerks and stenographers then in the employ of the departments was definitely settled. Thereafter they are to be treated as if they had worked their way to those positions under the act, and their salaries are not to be increased within

the grade except as provided in sections 1, 2 and 5 of chapter 605.

Section 6 by plain implication authorizes promotions from a lower grade to a higher one for positive merit and upon the filing of a certificate of the nature described in the section. There is no limitation upon this right of promotion from one grade to another, and I therefore see no reason why a head of a department may not make such a promotion from any step in the lower grade to the higher grade. When such a promotion has been made section 3, in my opinion, becomes effective, and the stenographer or clerk, on being assigned to the higher grade to which he or she is promoted, may be "put," as a matter of course, at the first step in the grade, or, in exceptional cases, at the second or third step.

In my opinion, since Dec. 1, 1914, section 3 applies only to new appointments and to promotions from one grade to a higher one. It authorizes a head of a department, when a clerk or stenographer is first assigned either by appointment or promotion to a particular grade, to place him or her, in special cases, at the second or third step within the grade instead of at the first step. It does not, in my opinion, authorize increases of salaries within the grade in a manner not provided in section 5.

It follows from the foregoing conclusions that except by a promotion to a higher grade the salary of a clerk or stenographer cannot be increased by more than an annual increment of \$50 without the approval of the Governor and Council as provided in section 5.

SAVINGS BANKS — FORM OF DEPOSITS — ACCOUNTS PAYABLE
ONLY TO PERSONS OTHER THAN DEPOSITOR.

A savings bank is not authorized to receive deposits subject to the control and withdrawal only of a person other than the depositor.

The question raised by your letter, relative to deposits in savings banks, concisely stated is this: Is it permissible for A, B, C and D to make deposits in a savings bank subject to the control and withdrawal only by E, if the aggregate deposits exceed \$2,000?

To the Bank
Commissioner.
1915
June 11.

The statute provides for deposits in savings banks by individuals, by persons jointly, and by administrators, executors and trustees. In case of the death of the trustee the trust fund may be paid over to the person for whom the deposit was made, and such payment relieves the bank from liability, even though as between the parties the trustee is the true owner. The statute makes no provision for the deposit of funds in the name of A with the right of withdrawal by B. Even though the result might be the same if a depositor assigns his deposit to another, this fact does not enlarge the statutory authority.

The Legislature has seen fit to place a limit on deposits in savings banks. One of the purposes of such a limitation is obviously the protection of institutions designed for the use and benefit of depositors of comparatively small amounts. The law has made it difficult, if not impossible, for any person to have the right of withdrawal of large sums of money, which in times of stress might cripple or impair a bank. Even though a person may make deposits as administrator, executor and trustee in any number of cases, and thus withdraw such deposits on a given date, and even though this might perhaps be accomplished by a deposit by X in the names of a number of other persons, such persons immediately thereafter assigning their deposits to X, the risk involved by the owner of such deposits has evidently been considered such a restraining influence as to make further legislation unnecessary. The method suggested in your letter, however, would remove even the

element of risk and would result in making the law of limitation of deposits of no practical effect.

I am therefore obliged to advise you that such deposits are not authorized or contemplated by the statute.

EXTRADITION — GOVERNOR — POWER TO REVOKE EXECUTIVE WARRANT.

It is within the power of Governor to revoke an executive warrant issued in the matter of interstate rendition at any time before the fugitive has actually been removed from the limits of the Commonwealth.

To the
Governor.
1915
June 16.

Answering your communication requesting that I advise you "what the power of the executive might be regarding the recall of an executive warrant on which a fugitive from justice has been arrested," I have the honor to reply as follows: —

In my opinion you have the right to revoke an executive warrant issued in a matter of interstate rendition at any time before the actual removal of the fugitive from the limits of the Commonwealth, and this is true even after the surrender of the fugitive to the agent of the demanding State. *Work v. Corrington*, 34 Ohio State, 64.

The power of revocation, however, so far as the question of legal or moral duty is concerned, is commensurate with the power to issue the warrant, and its exercise should be determined upon the same considerations as would justify the exercise or the refusal to exercise the power to issue. Ordinarily a court which has the power to issue process inherently possesses the power to quash or revoke the same.

While the statutes of the United States are mandatory in form in requiring the executive authority of the asylum State to deliver the fugitive to the agent of the demanding State, upon the presentation of papers properly certified as authentic and in other respects complying with the conditions prescribed by Congress, there is no power in any Federal court which can compel the issuance of such a warrant, and, from

the same reasoning, no power exists to restrain the executive authority from revoking a warrant once issued.

U. S. Comp. Sts., 1913, § 10126, formerly Rev. Sts., § 5278, which provides for the enforcement of section 2 of Article IV. of the Constitution of the United States, creating the right of interstate rendition, is as follows: —

Whenever the executive authority of any State or territory demands any person as a fugitive from justice, of the executive authority of any State or territory to which such person has fled, and produces a copy of an indictment found or an affidavit made before a magistrate of any State or territory, charging the person demanded with having committed treason, felony or other crime, certified as authentic by the Governor or Chief Magistrate of the State or territory from which the person so charged has fled, it shall be the duty of the executive authority of the State or territory to which such person has fled to cause him to be arrested and secured, and to cause notice of the arrest to be given to the executive authority making such demand, or to the agent of such authority appointed to receive the fugitive, and to cause the fugitive to be delivered to such agent when he shall appear. If no such agent appears within six months of the time of the arrest, the prisoner may be discharged. All costs or expenses incurred in the apprehending, securing and transmitting such fugitive to the State or territory making such demand, shall be paid by such State or territory.

It has been established by numerous judicial decisions, and the executive authority of this Commonwealth has at different times been advised by the Attorney-General, that when a case is presented which is clearly one contemplated by the Federal Constitution, the Governor has no discretion, and it is his imperative duty to issue the warrant. II. Op. Atty.-Gen., 368; III. Op. Atty.-Gen., 432; *Kentucky v. Dennison*, 24 How. 66.

But to adopt the language of the court in *Nisbett v. Toole*, 69 Minn., 104, "that duty, however, is one of imperfect obligation, for if a Governor refuses to perform it we know of no power, State or Federal, to compel him to do so."

In discussing this act in *Kentucky v. Dennison*, *supra*, the court says: —

The words "it shall be the duty," in ordinary legislation, imply the assertion of the power to command and to coerce obedience. But,

looking to the subject-matter of this law and the relations which the United States and the several States bear to each other, the court is of the opinion the words "it shall be the duty" were not used as mandatory and compulsory, but as declaratory of the moral duty which this compact (the Constitution) created when Congress had provided the mode of carrying it into execution. The act does not provide any methods to compel the execution of this duty nor inflict any punishment for neglect or refusal on the part of the Executive of the State; nor is there any clause or provision in the Constitution which arms the government of the United States with such power.

The first and only judicial consideration in this Commonwealth of the power of the Executive to revoke his warrant is in the case of *Wyeth v. Richardson*, 10 Gray, 240, decided in 1837. In this case the petitioner was arrested under a warrant issued against him by the Governor of Massachusetts on the requisition of the Governor of Iowa. After the issuing of the writ of habeas corpus the Governor revoked his warrant and the prisoner demanded his discharge. The respondent contended the Governor had no power to revoke such a warrant once issued, but Bigelow, J., ruled otherwise, and discharged the prisoner. On exceptions to the Supreme Judicial Court the question of the power to revoke an executive warrant was not considered, the case being decided upon the ground that exceptions do not lie in habeas corpus proceedings. Judge Bigelow's action, however, in this case has been cited as authority for the existence of the power of revocation. *Nisbett v. Toole*, 69 Minn. 104.

In further discussing this power in the case last cited the court goes on to say:—

We are not prepared to assent to the proposition that in determining whether a case contemplated by the Constitution is presented, the Governor on whom the demand is made is vested with no discretion, even where the papers upon their face are sufficient and in due form. We all know, as a matter of fact, that governors do exercise a discretion in such cases, and if they are satisfied that the demand is made for some ulterior and improper purpose, as, for example, the collection of a private debt, they refuse to issue a warrant. If a Governor may exercise such a discretion in regard to issuing such a warrant, we do not see why he may not

exercise the same discretion in regard to revoking it, and if he does revoke it his reasons for so doing can no more be inquired into than his reasons for refusing to issue it in the first instance. The existence of the power to revoke would seem necessary in order to prevent great abuses and wrongs. A warrant is, of necessity, almost always issued *ex parte*, and the Governor is liable to be imposed upon by those demanding it, or, for some other cause, to issue it improvidently. It would seem that in such cases the same officer who had the power to issue the warrant should have the power to remedy the wrong by revoking it.

Within a very few days the Acting Governor of New Jersey has refused the application of the Acting Governor of this Commonwealth for one Merrill, for reasons, it is true, which this department cannot acknowledge to be sound; but, nevertheless, in the assumption of a discretion, with the exercise of which no power in this Commonwealth can interfere.

In the case of *In re James Carroll*, 11 Chic. Leg. News, 14, arising out of a revocation by the Governor of Illinois of his executive warrant, in discussing the contention that the action of the Governor in issuing such warrant was merely ministerial, and the warrant once issued cannot be recalled, the court says:—

In one sense it is ministerial,—the issuing of a warrant under the express requirements of a statute of the United States and of a State; yet that warrant can only be issued, as we have seen, upon the examination of papers required to be submitted to him, and upon the exercise of his judgment as to its sufficiency and legality. He must determine the facts and he must exercise discretion and judgment. If he errs, and, after issuing the warrant finds it out, then it would seem to be consonant with right and justice that he retrace his steps by recalling it. A case might arise in which a Governor might be grossly imposed upon, as by the presentation of forged documents or requisitions in due legal form; or might have been presented in bad faith, with no object or intention of having a man tried upon the charge contained in an indictment or warrant, but with an ulterior design, under the form of extradition papers against a man innocent of the specific charges, but wanted for other purposes. In such cases the Governor would not be obliged to issue his warrant, and would be justified in refusing, or if he had issued it, to annul and revoke it.

The warrant is a process ministerial and quasi judicial, and I see no reason why the Executive who issues it may not in his discretion and

the exercise of a sound judgment, on a review of the facts, annul and revoke it if done in time to be effectual.

The only case which has come to my attention in which the power to revoke such a warrant has been denied is *Hosmer v. Lovelan*, 19 Barbour (N. Y.), 111. This case was an action for libel founded upon an allegation that an affidavit presented to the Governor of New York, on an application for the revocation of an executive warrant in extradition process, contained libelous matter. The defendant contended the matter was privileged, but the court held otherwise, on the ground that in order to be privileged the tribunal to which the affidavit was presented must have been vested with authority to render judgment in the proceeding, whereas in the case at bar "the Governor had no power whatever to entertain an application to recall, revoke or modify the warrant which he had issued for the apprehension of True."

While papers for interstate rendition uniformly contain representations to the effect that "the demand for the fugitive is made in good faith, with the sole intent to prosecute and punish him for said crime and not to secure his return . . . to afford opportunity to serve him with civil process, nor for the purpose of collecting a debt, nor for any private purpose whatsoever; and that if the requisition applied for be granted, a criminal proceeding shall not be used for any of said objects," etc., these assertions have the force of *prima facie* evidence only. These matters and others affecting the good faith of the prosecution are properly open to review by the Governor of the asylum State in determining whether or not he will honor the demand.

So far, therefore, as the legal right of revocation exists, the weight of authority appears to be in favor of the right to revoke upon a consideration of the same matters which would justify a refusal to issue the warrant in the first instance.

From an examination of the authorities it appears that the power not only to exercise a discretion in the issuance of such process in the first instance, but to revoke the warrants once issued, has not infrequently been exercised.

HOURS OF LABOR — EMPLOYEES FOR OR UPON PUBLIC WORKS — DEFINITION.

St. 1911, c. 494, § 1, establishing eight hours as a day's work for "all laborers, workmen and mechanics now or hereafter employed . . . by any contractor or subcontractor for or upon any public works," applies to all laborers, workmen and mechanics employed by any person contracting, directly or by subcontract, for the performance of any portion of a public work, whether the work is performed upon the public works or at any other place within the Commonwealth, but it does not apply to employees of persons merely selling materials and supplies to such contractors.

I beg to acknowledge your letter requesting my opinion on the interpretation of chapter 494 of the Acts of 1911, as "to what class of employees do the words 'for or upon any public works' apply."

To the State
Board of Labor
and Industries.
1915
June 21.

Section 1 of said chapter appears to apply not only to laborers, workmen and mechanics employed by the Commonwealth, but also to laborers, workmen and mechanics employed by contractors or subcontractors for or upon public works. In my opinion a contractor or subcontractor for public works is distinguished from a contractor or subcontractor upon public works in that a contractor or subcontractor for public works is one who is performing some portion of the work required by the contract for such public works where such portion of the work is not performed upon the public works themselves or the premises upon which the public works are being constructed, while a contractor or subcontractor upon public works is one who is performing his portion of the contract upon the public works themselves or on the premises or so near thereto that in contemplation of law the work can be said to be performed upon the public works.

The result is that one who takes a contract for the performance of a portion of the work required in the construction of public works is bound by the provisions of the act, whether the work performed by him under the contract is upon the public works themselves or at any other place within the Commonwealth.

In my opinion the test will always be whether the defendant is in fact a subcontractor of a portion of the contract, agreeing

with the contractor to perform a certain specified part of the contract, or is merely a seller of materials and supplies to the contractor. If he is in fact such a subcontractor, he comes within the provisions of the act; if a mere seller of materials and supplies, then the provisions of the act do not apply.

In my judgment the act applies only to such laborers, workmen and mechanics as are employed for or upon public works, so that to constitute a violation of the act it must appear that the laborer, workman or mechanic has in fact worked more than eight hours a day for his employer upon work done in the performance of the contract.

I have given careful consideration to the views expressed in briefs filed with me by counsel for Coleman Brothers, who, I understand, are particularly interested in the construction of this statute, and by counsel for the Massachusetts State Branch of the American Federation of Labor and for the General Contractors' Association. It is contended by all of the counsel that the proper construction of the provisions of the act limits their application to laborers, workmen and mechanics who are employed upon the public works themselves or, at least, at the site of the public works. I am unable to agree with this construction. Counsel base their contention upon the following decisions in the State of New York with relation to the construction of a similar statute in New York. *Downey v. Bender*, 57 App. Div. (N. Y.) 310; *Bohnen v. Metz*, 126 App. Div. (N. Y.) 807, affirmed 193 N. Y. 676; *Ewen v. Thompson-Starrett Co.*, 208 N. Y. 245.

The phraseology of that part of the New York statute which relates to the hours of labor for laborers, workmen and mechanics is somewhat different from the phraseology of the Massachusetts statute relating to such hours of labor, and that part of the New York statute must be read in connection with other provisions of the act, particularly those contained in the same section. In the interpretation of the intention of the New York Legislature the courts of New York have given consideration to the provisions of the entire act, and in this consideration have come to the conclusion that it was the intention

of the Legislature to restrict the application of the statute to laborers, workmen and mechanics employed "on, about or upon public work."

Furthermore, it is to be noted that in a dissenting opinion in *Ewen v. Thompson-Starrett Co.* two of the justices of the New York Court of Appeals, while concurring in the result of the decision, held that a construction of the New York statute which limited its application to laborers, workmen and mechanics employed "on, about or upon such public work" nullified the provisions of the statute to a great extent, and that such a construction was unnecessary to the determination of the case.

It follows, therefore, in my opinion, that in the case you have cited, if the workmen are in fact employed for more than eight hours a day upon work performed in the furtherance of a contract with the Commonwealth, the contractor is subject to the penalties prescribed in the statute.

TAXATION — BOND OF TAX COLLECTOR — RIGHT TO DISCHARGE AND ACCEPT NEW BOND.

There is no provision of law authorizing the surrender and cancellation of a bond given by a tax collector under the provisions of R. L., c. 25, § 77, before its condition is fully performed, and the acceptance of a new bond for a lesser amount in place thereof.

I beg to acknowledge your inquiry as to whether, in my opinion, the bond required to be given by the collector of taxes of a town may be legally surrendered and cancelled before its condition is fully performed and a new bond for a lesser amount accepted in place thereof; if so, you ask by whom this may be done.

R. L., c. 25, § 77, provides: —

The collector of taxes shall give bond to the town for the faithful performance of his duties, in a sum and with sureties approved by the selectmen.

To the Tax
Commissioner.
1915
June 22.

The only discretion given by this section to the selectmen concerns the approval of the penal sum of the bond and the sureties who execute it. If a satisfactory bond is not given by the collector within ten days after his election they may declare the office vacant and appoint another in his place. St. 1913, c. 835, § 427. It plainly is their duty to do so if a satisfactory bond is not promptly given.

When such a bond has been given and approved, it becomes a contract between the collector and his sureties on the one hand and the town upon the other. It cannot be discharged by the collector except by the faithful performance of the duties imposed upon him by the statutes, namely, by collecting and paying over to the treasurer of the town the full amount committed to him by the warrant, or by discharging himself from liability for the taxes thus committed to him in the manner prescribed by the statutes. Even though not re-elected, it is his duty to complete the collection of the taxes committed to him unless his tax list is transferred to his successor (St. 1909, c. 490, Part I., § 13).

I find no provision in the statutes authorizing the selectmen of the town to discharge a tax collector or the sureties upon his bond from their obligation to the town under the bond and to accept a new bond for a lesser amount in substitution therefor. In my opinion they have no authority to do so. I find no provision of law giving such authority to the town itself, acting through a legally called town meeting. I have very grave doubt if it exists even there without express legislative action.

It is plain that after a substantial part of the taxes assessed for any particular year has been collected and paid over to the treasurer of the town, the extent of the liability of the sureties is very much reduced. Their outstanding liability upon the bond for that year is measured by the amount of taxes then remaining uncollected or unaccounted for. With this reduction in the risk of liability a surety company which has executed such a bond should in fairness reduce the amount of future premiums to be paid to it for the execution of the bond. It seems to me that the burden of accumulating premiums upon

these bonds should be reduced in this manner, and not by an attempt to discharge the obligation required by the statute or to substitute a lesser obligation therefor.

MINIMUM WAGE COMMISSION — AUTHORITY TO ESTABLISH A
WAGE BOARD — EFFECT OF CHANGE IN STATUTORY
METHOD OF SELECTION.

A wage board not completely established by the Minimum Wage Commission until after the enactment of St. 1914, c. 368, providing a new method for the selection of representatives on such board, can be legally established only by the selection of all its representatives as provided in that statute.

I beg to acknowledge your letter inquiring in substance whether, in my opinion, the wage board established by your commission to determine the minimum wages to be paid to candy makers was established in accordance with law.

To the
Minimum Wage
Commission.
1915
June 30.

Your authority to establish this board is granted to you by section 4 of chapter 706 of the Acts of 1912, as amended by chapter 368 of the Acts of 1914. Until this amendment, which became effective on April 17, 1914, your commission was authorized to appoint not less than six representatives, of its own selection, on behalf of employers, and an equal number of persons to represent the employees, and in addition one or more disinterested persons, not to exceed one-half of the number of representatives of either of the other parties, to represent the public. As I understand it, your commission voted on Dec. 9, 1913, to establish a wage board to determine the minimum wages to be paid candy makers; six representatives of employers were appointed by the commission on April 14, 1914; the chairman, a disinterested person, was appointed on April 7; two other members to represent the public were appointed on April 17; six members representing employees were appointed on May 9 and May 19, respectively, and the representatives of both employers and employees were appointed by your commission without receiving nominations from either party.

On April 17, 1914, chapter 368 of the acts of that year became effective. By section 1 of that chapter, section 4 of chapter 706 of the Acts of 1912 was so amended as to require the representatives of employers and employees to be selected by your commission from nominations made to it by the respective parties, provided those nominations were made within ten days after the request of your commission. When this statute became effective your commission had not finally established the wage board in question. Merely the representatives of the employers and one of the representatives of the public were appointed before that date. After that date the only law in effect authorizing you to establish a wage board was contained in section 4 of chapter 706 of the Acts of 1912, as amended by section 1 of chapter 368 of the Acts of 1914. In my opinion a wage board cannot be regarded as established until all its members have been finally determined and appointed by your commission. In the case under consideration this was not until May 19, 1914, when the last appointments were made. At that time your only authority to establish a wage board was to be found in the amended statute. By that statute you are authorized to make appointments only after receiving nominations from both employers and employees, unless the parties fail to make such nominations within ten days after notice from your commission. As the wage board in question had not been finally established before April 17, 1914, in my opinion the only course open to your commission on that date was to begin anew, and to establish the board as to its representatives from all parties in accordance with the provisions of the amendment which became effective on that date. It follows in my opinion that the board to which you refer was not established in accordance with law.

DIRECTORS OF PORT OF BOSTON — WRECKS — AUTHORITY TO REMOVE.

The Directors of the Port of Boston, within the territory entrusted to their charge, have the powers granted to the Board of Harbor and Land Commissioners by R. L., c. 97, §§ 15-23, inclusive, concerning the removal of wrecks, and are authorized to expend such sums as are reasonably necessary to carry out the provisions of that statute.

You have requested my opinion as to the authority of your Board with reference to the removal of wrecks and obstructions in Boston Harbor.

R. L., c. 97, §§ 15-23, inclusive, deal with this matter, granting authority throughout the Commonwealth to the Board of Harbor and Land Commissioners.

• Section 15 provides: —

If a wrecked, sunken or abandoned vessel, or any unlawful or unauthorized structure or thing, is deposited in the tide waters of this commonwealth, or is suffered to remain therein, and in the judgment of the board of harbor and land commissioners it is, or is liable to cause or become, an obstruction to the safe and convenient navigation or other lawful use of such waters, said board shall remove it or cause it to be removed.

Section 16 provides for notice by the Board in the first instance to the owner to remove the vessel or obstruction, specifying some definite date reasonably far advanced to permit of compliance with the notice. Section 17 provides that if the notice is not complied with the Board shall cause or complete the removal, and the expenses thereof, when certified by the Board and approved by the Governor and Council, shall be paid by the Commonwealth. Section 18 provides for liability over to the Commonwealth on the part of the owner for the expense so incurred. Section 19 provides for the sale of materials recovered in the course of removal, if the expense of the removal is not paid by the owners within ten days.

It would be well for your Board to read the exact provisions of this chapter so as to have them freshly in mind when taking any action.

To the
Directors of
the Port of
Boston,
1915
July 16.

St. 1911, c. 748, § 4, provides: —

All the rights, powers and duties now pertaining to the board of harbor and land commissioners in respect to such lands, rights in lands, flats, shores, waters and rights belonging to the commonwealth in tidewaters and land under water as constitute that part of Boston harbor lying westerly and inside of a line drawn between Point Allerton on the south and the southerly end of Point Shirley on the north, or as adjoin the same or are connected therewith, and any other rights and powers heretofore vested by the laws of the commonwealth in the board of harbor and land commissioners in respect to any part of said area, are hereby transferred to and hereafter shall be vested in and exercised by said directors. . . .

Accordingly, it would seem clear that the authority granted to the Board of Harbor and Land Commissioners under the provisions of chapter 97 of the Revised Laws, mentioned above, is now vested in your Board with reference to the territory described.

St. 1911, c. 748, § 17, provides: —

To meet expenses that may be incurred under the provisions of this act the treasurer and receiver general is hereby authorized, with the approval of the governor and council, to issue bonds, scrip, or certificates of indebtedness to an amount not exceeding nine million dollars, . . . to be issued in such amounts, from time to time, as the treasurer and receiver general, with the approval of the governor and council, shall determine.

Expenses incurred in the removal of obstructions in the waters over which jurisdiction has been conferred upon you would certainly be expenses incurred under the provisions of this act. While doubtless a special appropriation for this purpose, as requested in your report for the year ending Nov. 30, 1914, might be desirable, so that the original appropriation could be more exclusively devoted to permanent improvements, it does not seem to be necessary that such appropriation should be made in order for you legally to carry out the requirements of chapter 97.

Accordingly, I am of the opinion that your Board has the powers granted to the Board of Harbor and Land Commis-

sioners under the provisions of R. L., c. 97, §§ 15-23, inclusive, over the territory entrusted to your charge, and is authorized to expend from amounts secured by the issuance of bonds, etc., approved by the Governor and Council, under the provisions of St. 1911, c. 748, § 17, amounts reasonably necessary to carry out the requirements thereof.

**BOSTON FINANCE COMMISSION — DUTY OF ATTORNEY-GENERAL
TO ADVISE — POWERS — WITNESSES — NECESSITY OF SUM-
MONS — RIGHT TO COUNSEL AND STENOGRAPHER — POWERS
OF MAYOR — RULES OF COMMISSION.**

The Boston Finance Commission has no power to require officials and employees of the city of Boston or of the county of Suffolk to come before it except by summons, though such officers and employees may individually waive summons at any time, except that they may be required not to do so by a superior officer as to the hours when they are actually employed.

Such witnesses are entitled to be represented by counsel, but they are not entitled to have a stenographer present, and a rule of the Boston Finance Commission limiting this right to be represented by counsel is not within its authority.

The mayor of the city of Boston has no authority in any manner to limit the powers of the Boston Finance Commission.

If an assistant corporation counsel of the city of Boston appears before the Boston Finance Commission as counsel for a person summoned before it at his request, the commission has no right to object.

I acknowledge the receipt of your letter requesting my
opinion upon the following questions:—

To the Boston
Finance
Commission.
1915
July 21.

1. Has the Finance Commission power to have officials and employees of the city of Boston and the county of Suffolk come before it on request, without summons? If a summons is necessary, have said employees the individual right to waive said summons? Has a superior officer the power or right to order them not to waive said summons?

2. If a city employee is required by law to be legally summoned to the office of the commission, is it not within the power of the commission, under section 2, chapter 562 of the Acts of 1908, to refuse to allow the person summoned to be present with counsel and with a stenographer?

3. Has any direction or order of the mayor to any employee or to the commission itself any effect upon its powers, and does the attached copy of the order of the mayor of June 18, 1915, addressed to the heads of de-

partments and members of boards and commissions of the city of Boston, infringe the rights and powers of the Finance Commission as defined in chapter 486 of the Acts of 1909?

4. Are the following rules and regulations for the conduct of hearings and the giving of testimony reasonable and in conformity with section 2 of chapter 562 of the Acts of 1908 and section 21 of chapter 486 of the Acts of 1909:—

(a) A witness summoned before the commission may be represented by counsel who may cross-examine the witness for whom he appears for not more than ten minutes during his examination. This rule permitting counsel to be present is to be regarded not as creating a right but as extending a privilege, and the commission reserves the right to withdraw the same at any time.

(b) The commission will permit any person retained in the interest of a witness to submit to the commission in writing any questions which he thinks ought to be put to the witness, and such questions will be put by the chairman if pertinent and proper. Every witness will also be allowed, under advice of counsel or by his own motion, to decline to answer questions which may tend to incriminate him.

(c) The witness will also be allowed to make any pertinent statement either at the beginning or the end of his examination. Such statement may be prepared under advice of counsel.

(d) At public hearings held by the commission counsel for any witness may ask him any pertinent question and may offer pertinent evidence through other witnesses subject to cross-examination by the commission and its counsel.

(e) The commission will receive from any person not called as a witness, who desires to volunteer at public hearings information or testimony relative to the work of the commission, a request in writing addressed to the commission and stating in brief the matters upon which the writer desires to be heard. If the commission deems such information or testimony relevant and helpful, a time and place will be designated at which the same will be publicly given.

5. Has the mayor, under the revised ordinances, power to order the law department to assign one of its assistant corporation counsels to attend as counsel for city employees when the latter are summoned before the Finance Commission? (See revised ordinances, 1914, chapters 3 and 20.)

There is some question as to whether your commission is a State board or commission, within the meaning of section 1 of chapter 7 of the Revised Laws, to which the Attorney-General is required to render legal services. Although you are appointed by the Governor, with the advice and consent of the Council, and required to report to the General Court each year, nevertheless, your jurisdiction is confined to the city of Boston and the county of Suffolk. Furthermore, you are authorized to employ counsel.

Officers and boards in a like situation have requested opinions of my predecessors in office, and they have apparently entertained different views as to whether they were required to give opinions to such officers and boards.

On Dec. 22, 1905, the Honorable Herbert Parker rendered an opinion to the chairman of the Police Commission of Boston, expressing some doubt as to whether that board had authority to take the opinion of the Attorney-General.

On Dec. 8, 1910, the Honorable Dana Malone rendered an opinion to the Police Commissioner of the city of Boston.

On July 6, 1911, the Honorable James M. Swift declined to express an opinion upon questions submitted to him by the Police Commissioner of the city of Boston, on the ground that the Police Commissioner was not a State officer within the meaning of section 1 of chapter 7 of the Revised Laws. Mr. Swift took the same attitude on March 3, 1911, in relation to a request for his opinion by the Boston Finance Commission, and, on Feb. 19, 1913, took the same attitude in relation to a communication from the Licensing Board of the city of Boston.

While I have some doubt as to whether I am required to advise your commission, I prefer to give an opinion upon the questions propounded, so far as they relate to a construction of the statutes creating and governing your commission, in order that I may be sure, in a situation of doubt, to perform my full duty.

The first question upon which you request my opinion includes three questions:—

First, has the Finance Commission power to have officials and employees of the city of Boston and the county of Suffolk come before it on request without summons?

Second, if a summons is necessary, have said employees the individual right to waive said summons?

Third, has a superior officer the power or right to order them not to waive said summons?

As to the first inquiry, I think it clear that as the power of your commission is derived solely from chapter 562 of the Acts of 1908 and chapter 486 of the Acts of 1909, the only power

given to the commission to require officials and employees of the city of Boston and the county of Suffolk to come before it is upon a summons.

As to the second inquiry, I think it equally clear that such officials and employees have the individual right to waive such summons.

As to the third inquiry, I am of the opinion that a superior officer has the right to require that employees under his direction shall not leave their employment during the hours when they are at work for the city of Boston or the county of Suffolk unless they are required by law to do so. It follows that, as to the hours when the employees are employed for the city of Boston or the county of Suffolk, the superior officer has the right to order them not to waive the necessity of such summons. As to the hours when they are not employed or on duty, I am of opinion that they may waive the summons and appear voluntarily before the commission and give such testimony under oath as the commission may properly require, notwithstanding any order or direction by a superior officer to the contrary.

Your second question is as follows: —

If a city employee is required by law to be legally summoned to the office of the commission, is it not within the power of the commission, under section 2, chapter 562 of the Acts of 1908, to refuse to allow the person summoned to be present with counsel and with a stenographer?

Section 27 of chapter 562 of the Acts of 1908 expressly provides that witnesses before your commission may be represented by counsel, who may cross-examine them for not more than ten minutes during their examination. It is apparent, therefore, that your commission has no authority to refuse to allow the person summoned to be represented by counsel. I can find no provision in the acts under which you derive your authority for stenographers for witnesses. Consequently, I am of the opinion that the commission, if it is found expedient, may deny to the witness the privilege of having a stenographer of his selection present.

Your third question is as follows:—

Has any direction or order of the mayor to any employee or to the commission itself any effect upon its powers, and does the attached copy of the order of the mayor of June 18, 1915, addressed to the heads of departments and members of boards and commissions of the city of Boston, infringe the rights and powers of the Finance Commission as defined in chapter 486 of the Acts of 1909?

Your commission is appointed, as I have before stated, by the Governor, with the advice and consent of the Council, to inquire into certain matters relating to the city of Boston and the county of Suffolk. Its functions, in my opinion, are entirely independent of the city government of the city of Boston; it is subject in no way to any control by the mayor or council of the city of Boston, and it follows that any direction or order of the mayor to any employee of the city of Boston or to the commission itself can have no effect whatever upon its legal powers.

This answers your inquiry in relation to the attached copy of the order of the mayor of June 18, 1915, so far as it in any way seeks to infringe the rights and powers conferred upon the Finance Commission. I think it unnecessary for me to determine whether any direction contained in the order is in effect a direction to officials and employees of the city of Boston to resist or interfere with the proper exercise of the functions of your commission, nor do I think I am called upon to express any comments as to the propriety of the order.

Your fourth question requests my opinion as to whether certain rules and regulations of the commission are reasonable and in conformity with section 2 of chapter 562 of the Acts of 1908 and section 21 of chapter 486 of the Acts of 1909. The first rule is as follows:—

(a) A witness summoned before the commission may be represented by counsel who may cross-examine the witness for whom he appears for not more than ten minutes during his examination. This rule permitting counsel to be present is to be regarded not as creating a right but as extending a privilege, and the commission reserves the right to withdraw the same at any time.

I am of the opinion that the last sentence of said rule is not in conformity with the provisions of the statutes above cited. These provisions create a right in the witness to be represented by counsel, and it is obvious that the commission has no power to withdraw this right. As section 21 of chapter 486 of the Acts of 1909 provides that "counsel for any witness at any public hearing may ask him any pertinent question and may offer pertinent evidence through other witnesses, subject to cross-examination by the commission and its counsel," it would seem desirable that the rule should so provide.

As to the remaining rules submitted to me, I am of the opinion that they are reasonable and free from objection.

As to your fifth question, "Has the mayor, under the revised ordinances, power to order the law department to assign one of its assistant corporation counsels to attend as counsel for city employees when the latter are summoned before the Finance Commission?", I feel that I have done all that is required of me if I answer it so far as it may affect the powers of your commission. The question whether the mayor has such power affects your commission only in so far as it relates to the obligation of the commission to recognize the corporation counsel or one of his assistants as counsel for the witness. The provision of the statutes authorizing witnesses to be represented by counsel is, in my judgment, for the protection of witnesses who may, as a result of the investigation of the commission, be charged with inefficiency, official misconduct or crime. Obviously, the selection of counsel must be left to the witness himself. If he sees fit to request a member of the legal department of the city to represent him as counsel, and such member appears for him, the commission has no power to exclude such counsel from being present while the witness is testifying. If there is any impropriety in members of the legal department of the city of Boston appearing for witnesses who may be later charged, as a result of the investigation, with inefficiency, misconduct or crime, the commission, in my opinion, is without power at present to prevent it. It follows that the mayor has no power to direct who shall appear as

counsel for the witness, and no official or employee is in any way bound by such a direction. As counsel for the city, the corporation counsel and his assistants have no standing in your hearing other than such as you, in your discretion, may see fit to give them.

CONSTITUTIONAL LAW — MEMBERS OF THE GENERAL COURT —
MASTERS IN CHANCERY.

A master in chancery is not a "judge of any court of this commonwealth" within the meaning of Article VIII. of the Amendments to the Constitution, and there is no constitutional objection to the appointment of a member of the General Court to that office.

You request my opinion as to whether or not a member of the Legislature can be appointed a master in chancery.

To the
Governor.
1915
July 21.

The only provision of the Constitution of the Commonwealth which has any bearing upon this matter is Article VIII. of the Amendments, which is as follows: —

No judge of any court of this commonwealth (except the court of sessions), and no person holding any office under the authority of the United States (postmasters excepted) shall, at the same time, hold the office of governor, lieutenant-governor, or councillor, or have a seat in the senate or house of representatives of this commonwealth; and no judge of any court in this Commonwealth (except the court of sessions), nor the attorney-general, solicitor-general, county attorney, clerk of any court, sheriff, treasurer and receiver-general, register of probate, nor register of deeds, shall continue to hold his said office after being elected a member of the Congress of the United States, and accepting that trust; but the acceptance of such trust, by any of the officers aforesaid, shall be deemed and taken to be a resignation of his said office; and judges of the courts of common pleas shall hold no other office under the government of this commonwealth, the office of justice of the peace and militia offices excepted.

In my opinion a master in chancery is not a "judge of any court of this commonwealth" within the meaning of the foregoing article. His duties are to a large extent administrative rather than judicial; they are more closely analogous to those performed by justices of the peace and notaries public than to

judicial duties. In my opinion, even to the extent that a master in chancery exercises judicial functions, he is not acting as a judge of a court within the meaning of the Constitution. I therefore see no constitutional objection to the appointment of a member of the Legislature to the office of master in chancery.

CAPE COD CANAL — CONTRACT FOR CONSTRUCTION — TIDAL GATES — EXTRA WORK — POWERS OF JOINT BOARD.

If the Joint Board created by St. 1899, c. 448, § 6, requires the construction of tidal gates or locks in the Cape Cod Canal, as authorized by the contract between the Boston, Cape Cod & New York Canal Company and the Cape Cod Construction Company, the latter is required to construct the same as additional work not covered by the price named in the contract, and is entitled to be paid therefor as additional work in accordance with the contract.

The approval by the Joint Board of a contract between the Boston, Cape Cod & New York Canal Company and the Cape Cod Construction Company for the construction of the Cape Cod Canal, by which the former agreed to pay the latter for such work substantially all the shares of stock and bonds which it was authorized to issue, was within the authority granted to the Board by St. 1900, c. 476, § 1.

The Joint Board has authority, notwithstanding the provisions of the contract between these companies for the construction of tidal gates, to approve and certify the issue by the Canal Company of capital stock of the par value of \$5,990,000 and first mortgage bonds of the par value of \$6,000,000, — substantially the entire amount of stock and bonds which the company is now authorized to issue, — for work which does not include the construction of such tidal gates or other similar devices.

To the Joint
Board of Public
Service Com-
missioners and
Harbor and
Land Com-
missioners.
1915
July 22.

I beg to acknowledge the request of the Joint Board for my opinion concerning certain questions which have arisen regarding the completion of the Cape Cod Canal.

The Boston, Cape Cod & New York Canal Company was incorporated by chapter 448 of the Acts of 1899, with an authorized capital stock of \$6,000,000. It was empowered to issue bonds to an amount not exceeding the amount of its paid-in capital stock. Section 2 of that chapter provides, in part, as follows: —

Said corporation may issue stock and bonds in payment for labor performed and material furnished in the construction of a canal as herein-after provided, and in payment for property acquired for that purpose.

As amended by section 1 of chapter 476 of the Acts of 1900 this section contains the following requirement:—

All issues of stock and bonds under the provisions of this act shall be subject to the approval and certification of the joint board provided for in section six of this act, in the manner provided in chapter four hundred and sixty-two of the acts of the year eighteen hundred and ninety-four, relative to the issue of stock and bonds by railroad and street railway companies; except that, if a contract or contracts shall be entered into by said corporation, by the terms of which capital stock and bonds are to be issued by said corporation in payment for labor to be performed or materials to be furnished in the construction and equipment of said canal, in accordance with the plans as approved by the board of harbor and land commissioners as provided in this act, and such contract or contracts be approved by said joint board, after such advertisement for bids thereunder as shall be satisfactory to said joint board and provided such contract shall be awarded to the lowest bidder, satisfactory to said joint board who gives bonds to the satisfaction of said canal company, said corporation may issue its capital stock and bonds from time to time, pro rata to the labor performed and the materials furnished on the certification by said joint board that such work has been done or such materials furnished and in accordance with the terms of any such contract.

Section 4 required the Canal Company to file with the Harbor and Land Commissioners plans of the proposed location and construction of the canal, and imposed upon that commission the duty of approving, disapproving or modifying such plans. It then declared:—

The plans so approved or modified, being accepted by said company, shall be deemed to be the plans of the location and construction of said canal, and said company shall be authorized to construct its canal in accordance therewith.

Section 6 created a Joint Board, consisting of the Railroad Commissioners, now the Public Service Commissioners, and the Harbor and Land Commissioners, and imposed upon that Board the duty of determining at what point or points the Old Colony Railroad should cross the canal by bridges or by tunnels. This is the only question of construction referred to the Joint Board. It may pass upon other matters of construction only as they

may be found to be incidental to this single question. See opinion of Attorney-General Knowlton to the Joint Board, dated April 6, 1901, II. Op. Atty.-Gen. 257.

On May 8, 1907, the Harbor and Land Commissioners approved the plans for the location and construction of the canal. These plans did not show any lock, tidal gate or other device for controlling the current in the canal. On June 3, 1907, the Joint Board approved a contract between the Boston, Cape Cod & New York Canal Company and the Cape Cod Construction Company for the construction of a canal in accordance with the plans approved by the Harbor and Land Commissioners. This contract provided that the Canal Company should pay the contractor for the performance of the contract the sum of \$11,990,000, payable \$5,990,000 in the stock of the Canal Company and \$6,000,000 in the bonds of the company; and that "payments shall be made by the Canal Company upon written requisitions approved by the chief engineer as the work proceeds from time to time *pro rata* to the labor performed and the material furnished and on the certification by the Joint Board that such work has been done and such materials furnished and in accordance with the terms of this contract."

Paragraph 5 of this contract gave to the Canal Company the right to require work to be done or material to be furnished in addition to that specified, upon the following condition: —

Provided, however, that if any such additional work to be done or materials to be furnished shall in the judgment of the chief engineer materially increase the cost of the whole to the Contractor, additional payments shall be made to the Contractor therefor with the addition of 10 per cent. for the Contractor's profit in cash or in shares of stock or bonds of the Canal Company at par, as the Canal Company shall determine.

The specifications contained the following provision: —

If at the expiration of one year after the canal is opened to public use it shall have been proved to the satisfaction of the Joint Board that a lock, tidal gates or some other device for controlling the current in the canal should be constructed in order to provide for the safe and suitable use of the canal by the public, then the Contractor shall construct such

lock, tidal gates or other device satisfactory to the Joint Board. And the same shall be considered as additional work and be subject to the provisions of the fifth paragraph of the contract as regards payment therefor.

I understand that the canal has been constructed in accordance with the specifications, and that the Joint Board has already approved requisitions for the issue of stock and bonds under the contract to the amount of \$5,232,000 of stock and \$5,240,000 of bonds, and that requisitions based upon work actually done by the contractor under the contract and covering all the remaining stock and bonds which the Canal Company is authorized by law to issue are now before the Joint Board for action.

A serious question having arisen whether some device for controlling the current in the canal is not necessary for the safe and suitable use of the canal by the public, the Joint Board asks my opinion upon the following specific questions:—

If the Joint Board should decide, under the provisions of the paragraph relative to locks or tidal gates on page 30 of said contract between the Canal Company and the Construction Company, that a lock, tidal gates or some other device for controlling the current in the canal should be constructed in order to provide for the safe and suitable use of the canal by the public:—

1. Would such construction, under the terms of said contract, be a part of the work for which said Canal Company has contracted to pay \$11,990,000 in stock and bonds to said Construction Company, or would such construction be additional work, as defined in paragraph 5 of said contract, to be paid for in accordance with the provisions of said paragraph "in cash or in shares of stock or bonds of the Canal Company at par, as the Canal Company shall determine?"

2. If such construction, under the terms of said contract, would be additional work as defined in said paragraph 5, has the Joint Board authority, under the provisions of the acts of the General Court relative to said Canal Company, notwithstanding the provisions of said contract, to approve and certify the issue by said Canal Company of capital stock to the par value of \$5,990,000 and first mortgage bonds to the par value of \$6,000,000 (or substantially the entire amount of stock and bonds which said company is authorized by its charter to issue), for work which does not include such construction?

3. If such construction, under the terms of said contract, would be a part of the work for which said Canal Company has contracted to pay \$11,990,000 in stock and bonds to said Construction Company, can the Joint Board legally withhold its approval and certification of an issue or issues of stock and bonds by said Canal Company to an amount which, in the opinion of the Joint Board, will be necessary for the purpose of paying for such construction and which, with previous issues of stock and bonds already approved and certified by the Joint Board, shall not exceed the contract price of \$11,990,000?

1. The answer to your first question is plain. The provision of the specifications already quoted submits to the Joint Board the determination of the necessity of the construction of locks or tidal gates after a year's trial of the canal without such devices. If the Board requires, the contractor shall then construct them, "and the same shall be considered as additional work and be subject to the provisions of the fifth paragraph of the contract as regards payment therefor." This is a plain and definite statement that the construction of such locks or gates is not a part of the work covered by the contract for which the Canal Company has contracted to pay \$11,990,000. The same statement in negative form is made by the last sentence of paragraph 13 of the contract, which, if properly punctuated in accordance with its obvious intent, would read as follows: —

And it is expressly agreed that the price to be paid the Contractor as herein prescribed includes full compensation for every such detail matter and thing, except as herein otherwise provided in respect of payments for additional work and materials including any lock, tidal gate or other device that may be called for as provided in the specifications.

Accordingly, in answer to your first question I reply that in my opinion such construction of locks, tidal gates or other devices for controlling the current in the canal would not be a part of the work for which the Canal Company has contracted to pay \$11,990,000 in stock and bonds, but would be additional work as defined by paragraph 5 of the contract, to be paid for as therein provided.

2. Your second question involves the further question of the legality of the approval of this contract by the Joint Board. If that approval was valid it is now not only the right but the duty of the Joint Board, on being satisfied that the labor and materials covered by the specifications, excluding locks and tidal gates, have been performed and furnished, to issue its certificate to that effect, and thus to permit the remaining stock and bonds specified in the contract to be issued in accordance with its terms. Its only duty is to certify that the work covered by the requisitions before it has been done. It has no power to modify in any respect the terms of the contract which it approved.

In my opinion the approval of this contract by the Joint Board was a valid exercise of the authority granted to it by section 1 of chapter 476 of the Acts of 1900. By section 4 of chapter 448 of the Acts of 1899 the Canal Company was required to file with the Harbor and Land Commissioners plans for the proposed location and construction of the canal. These plans, when approved by that Board, "shall be deemed to be the plans of the location and construction of said canal, and said company shall be authorized to construct its canal in accordance therewith." The only authority granted to the Joint Board concerning the construction of the canal is to be found in section 6. That authority concerns only the determination of the points at which the Old Colony Railroad shall cross the canal and such matters of construction of the canal as are incidental thereto. The Harbor and Land Commissioners appear to have considered the question of tidal locks, but they finally approved plans which contained no provision therefor. Upon this approval, in the language of the statute, the Canal Company was "authorized to construct its canal in accordance therewith," namely, without tidal locks or gates. It follows that if the Canal Company had first obtained the approval of the Joint Board of the issue of its stock and bonds for cash, and then had entered into a contract for the construction of the canal for a price to be paid in cash, the question which you now ask could not have arisen. The Joint Board would then

have had nothing to do with the performance of the contract by the Construction Company.

Section 1 of chapter 476 of the Acts of 1900, however, gave the Canal Company the privilege of contracting to pay for the construction of the canal by issuing its stock and bonds to the contractor, provided the advertisement for bids, the contractor and the contract itself were approved by the Joint Board. These provisions gave the Board no control whatever over the plans for constructing the canal. That was to be done, as this section expressly recites, "in accordance with the plans as approved by the Board of Harbor and Land Commissioners, as provided in this act." The approval of the contract by the Joint Board was required because of the right of supervision given to it over the issue of stock and bonds by this corporation. For that reason it was required to approve such matters as the method of obtaining bids, the selection of the contractor, the form of the contract and particularly the price to be paid. Being satisfied upon these matters the Board properly approved the contract. It would have had no authority to require that the contract cover the installation of tidal gates in addition to the work required by the plans approved by the Harbor and Land Commissioners. On matters of general construction it was bound by the action of that Board in approving the plans filed with it.

It is true that by the paragraph in the specifications heretofore quoted the parties have chosen to contract for the erection of tidal gates or other similar devices if the Joint Board shall deem them necessary. Doubtless by approving the contract the Joint Board has accepted this duty. At any rate, it is proper for it to undertake its performance, in the public interest. If it shall determine that such locks, gates or devices shall be erected, it will become the duty of the Construction Company to erect them to the satisfaction of the Board. For this work it will be entitled to receive from the Canal Company actual cost plus a 10 per cent. profit "in cash or shares of stock or bonds of the Canal Company at par, as the Canal Company shall determine." (Contract, par. 5.) The burden will then

be upon that company to raise the necessary cash or to obtain legislative authority to issue additional shares of stock or bonds.

Accordingly, my answer to your second question is that the Joint Board has authority, under the provisions of the acts of the General Court relative to the Canal Company, notwithstanding the provisions of the contract, to approve and certify the issue by the Canal Company of capital stock to the par value of \$5,990,000 and first mortgage bonds to the par value of \$6,000,000 (being substantially the entire amount of stock and bonds which the company is now authorized to issue), for work which does not include the construction of locks, tidal gates or other similar devices,

3. The answer given to your first and second questions makes it unnecessary to discuss the third question.

CORPORATIONS — BUSINESS CORPORATIONS — OPERATION OF TRACKLESS TROLLEYS.

Locations to maintain poles in public ways to be used in connection with the operation of a trackless trolley line cannot be granted by municipal authorities to a corporation formed under St. 1903, c. 437, commonly known as the business corporation act.

You ask my opinion as to the right of municipalities to grant locations for trackless trolleys, so called, their operation involving the use of poles and wires but no tracks or rails.

To the
Public Service
Commission.
1915
July 22.

I have conferred with the officers and counsel of the Massachusetts Highway Service Company and find that the method of operating its vehicles is by power from electric wires attached to poles in the highway. The type of trolley allows the vehicles to move fifteen feet on either side of the wire. It is thus apparent that the cars cannot be operated without the use of poles in the highway sustaining the wires.

The Massachusetts Highway Service Company is incorporated under the provisions of St. 1903, c. 437, as amended

by St. 1910, c. 385, an act known as the business corporation law. Paragraph (c) of section 1 of this act provides, in part, as follows: —

This act shall not apply to any corporations which now have or may hereafter have the right to exercise franchises in public ways granted by the commonwealth or any county, city or town.

In my judgment the word “franchise” as used in this section includes permits to maintain poles in public ways. Consequently, I am of the opinion that the selectmen of Sandwich are not authorized to grant locations for poles in its highway to the Massachusetts Highway Service Company.

PUBLIC WAREHOUSES — STORAGE OF SECOND-HAND GOODS AND FURNITURE.

R. L., c. 69, as amended by Gen. St. 1915, c. 98, applies to buildings or parts of buildings used for the storage of second-hand goods or furniture.

To the Chief
of the Massa-
chusetts
District Police.
1915
July 27.

You request my opinion as to whether the provisions of chapter 69 of the Revised Laws, as amended by chapter 98 of the General Acts of 1915, apply to buildings used for the storage of second-hand furniture or goods.

Chapter 69 of the Revised Laws deals with the regulation and licensing of public warehouses. Section 18, added to that chapter by amendment by chapter 98 of the General Acts of 1915, declares: —

The words “public warehouse,” as used in this act, shall mean any building, or part of a building, kept and maintained for the storage of goods, wares and merchandise as a business; — . . .

In my opinion second-hand furniture or goods come within the class “goods, wares and merchandise.” It is therefore my opinion that the statute in question applies to buildings or parts of buildings used for the storage of such goods as a business.

INSANE PERSONS — TEMPORARY TREATMENT — REQUEST BY POLICE OFFICER — PROBATION OFFICER.

A probation officer is not a police officer within the meaning of St. 1911, c. 395, as amended by Gen. St. 1915, c. 174, providing for the receiving of persons for temporary care and treatment in hospitals for the insane upon the request of certain officers or individuals.

I acknowledge your request for my opinion as to whether probation officers are police officers within the meaning of chapter 395 of the Acts of 1911, as amended by chapter 174 of the General Acts of 1915.

To the
State Board
of Insanity.
1915
August 2.

That statute provides, in part, as follows: —

The superintendent or manager of any hospital for the insane, public or private, may, when requested by a physician, by a member of the board of health or a police officer of a city or town, by an agent of the institutions registration department of the city of Boston, or by a member of the district police, receive and care for in such hospital as a patient, for a period not exceeding ten days, any person who needs immediate care and treatment because of mental derangement other than delirium tremens or drunkenness.

The provisions for the appointment of probation officers are to be found in chapter 217 of the Revised Laws. Section 83 of that chapter provides, in part, as follows: —

Said probation officers shall not be active members of the regular police force, but so far as necessary in the performance of their official duties shall have all the powers of police officers, and if appointed by the superior court may, by its direction, act in any part of the commonwealth and shall report to the court.

While by the section just quoted probation officers are given all the powers of police officers so far as may be necessary in the performance of their duties, yet, in my opinion, a probation officer cannot be fairly said to be a police officer of a city or town. The duties of probation officers are not restricted to particular municipalities. The territory within which they act is limited only by the jurisdiction of the court which appoints them. In my opinion they are not, therefore, police officers of

a city or town within the meaning of the statute under consideration. It follows that that statute does not authorize the receiving and caring for patients at their request. I suggest, however, that it would be a very simple matter, in any case where a probation officer has in charge a person whom he desires to have received at a hospital for the insane under this statute, for him to arrange with a police officer of the particular city or town where the person in question is a resident to make the formal request required by the statute.

CITIES — WARDS — DIVISION INTO PRECINCTS — TIME FOR ACTION.

Under St. 1913, c. 835, § 217, a city may not, after the first Monday of July in any year, make a division of any ward into precincts which shall become effective during that calendar year.

To the
Secretary of
the Commonwealth.
1915
August 5.

I acknowledge your request for my opinion as to whether a division of Ward 2 of the city of Revere into two precincts, made by vote of the municipal council of Revere on July 26, 1915, should be recognized by you as legal.

Section 217 of chapter 835 of the Acts of 1913, in providing for the division of wards of a city into two or more voting precincts, makes the following enactment: —

If a ward constituting one precinct contains less than one thousand voters, according to the registration of voters at the preceding annual city election, the aldermen may, and if it contains more than one thousand voters, shall, on or before the first Monday of July, divide it into two or more voting precincts. If a voting precinct shall, in any year, according to such registration, contain more than one thousand voters, the aldermen shall in like manner either divide such precinct into two or more voting precincts or shall make a new division of the ward into voting precincts; so that no precinct shall contain more than one thousand voters.

Your request raises the question whether the requirement that this division be made "on or before the first Monday of July" is to be regarded as mandatory or merely directory. This question is to be answered in the light of the apparent

purpose of this provision when read in connection with the remaining sections of this chapter relating to primaries, caucuses and elections. The primaries required by this statute are held in September. Before that time substantial preparations must be made, such as preparing separate ballots and lists of voters for each of the more than 1,100 voting precincts in the State. I understand that your work of preparing these ballots and the actual printing of the same must, as a practical matter, be begun soon after July 1. An opportunity must also be given for ample public notice to voters of the establishment of precincts, so that they may be informed of the place where they are to cast their ballots. For such reasons it seems plain that it is absolutely essential to the proper working of our present system of election laws that the division of wards into precincts, if made, should become effective a substantial length of time before the holding of the primaries.

The Supreme Judicial Court in the case of *Fitzgerald v. Mayor of Boston*, 220 Mass. 503, in passing upon chapter 630 of the Acts of 1914, referred to the provision that "the city council of the city of Boston shall, before the first day of January in the year nineteen hundred and fifteen, make a new division of the territory of the city of Boston" as containing "the positive command that the division must be completed before Jan. 1, 1915." This language applies with equal force to the statute under consideration.

Accordingly, reading this provision of section 217 in connection with the system of which it is a part, it seems to me apparent that the Legislature intended to impose a mandatory requirement that, for any division of a ward into precincts to become effective in the year in which it is made, that division must be made before the first Monday of July. Any other interpretation would seriously interfere with the proper operation of our election laws.

In my opinion it follows that the vote of the municipal council of the city of Revere, to divide Ward 2 into two precincts, passed on July 26 last, should not be recognized by you as effective during the present calendar year. I understand

that this ward had substantially more than 1,000 registered voters at the municipal election in December last. It was, therefore, the plain duty of the municipal council, under the statute which we are considering, to divide that ward into at least two precincts before the first Monday of July last. As it failed to comply with the statute there rests upon it a duty to correct this error at the earliest opportunity, so that the voters of this ward may suffer as little inconvenience as possible. I see no reason why, if the municipal council of Revere so desires, the vote of July 26 may not be permitted to become effective at any time in the year 1916 prior to the first Monday of July that the municipal council may determine.

MISUSE OF FLAG — PICTURES OF FLAG — USE ON COVERS OF PAPERS AND MAGAZINES.

R. L., c. 206, § 5, as amended by St. 1913, c. 464, and St. 1914, c. 570, forbidding the use or possession of "any article or substance, being an article of merchandise or a receptacle of merchandise or articles upon which shall be attached through wrapping or otherwise engraved or printed in any manner, a representation of the United States flag," merely forbids the engraving or printing of the flag, whether for advertising or decorative purposes, upon wrappers or receptacles, or upon articles which are themselves complete articles of merchandise aside from the presence of the flag upon them; and articles of which the representation of the flag is an inherent part, and to which the representation of the flag is not a mere ornamental and unessential addition, do not come within the prohibition of the statute.

A picture of the flag alone or a picture containing it as a *bona fide* part of the picture is not a violation of this statute when engraved or printed on a card or in or upon a book, paper or magazine, provided it is not used in any manner for advertising purposes.

The use of a picture of the flag or one containing a representation of it upon the cover of a book, paper or magazine for artistic or ornamental purposes is not a violation of the statute, unless some part of the use or purpose of such cover is to attract attention to and advertise the publication or its contents.

Red and white stripes, with no field of blue or stars, do not constitute a representation of the flag when it is not obvious that it was intended to depict thereby a portion of the flag.

To the Chief
of the Massa-
chusetts
District Police.
1915
August 6.

I acknowledge your letter requesting my opinion as to whether certain pictures submitted to me by you are in violation of R. L., c. 206, § 5, as amended by St. 1913, c. 464, and St. 1914, c. 570. That statute is as follows:—

Whoever publicly mutilates, tramples upon, defaces or treats contemptuously the flag of the United States or of Massachusetts, whether such flag is public or private property, or whoever displays such flag or any representation thereof upon which are words, figures, advertisements or designs, or who shall in this commonwealth expose to public view, manufacture, sell, expose for sale, give away or have in possession for sale or to give away or for use for any purpose, any article or substance, being an article of merchandise or a receptacle of merchandise or articles upon which shall be attached through a wrapping or otherwise engraved or printed in any manner, a representation of the United States flag, shall be punished by a fine of not less than ten nor more than one hundred dollars; but a flag which belongs to a grand army post, to a camp of the legion of Spanish war veterans or which is the property of or is used in the service of the United States or of this commonwealth may have the names of battles and the name and number of the organization to which such flag belongs inscribed thereon. Words, figures, advertisements or designs attached to, or directly or indirectly connected with, the flag or any representation thereof in such manner that the flag or its representation is used to attract attention to or advertise such words, figures, advertisements or designs, shall for the purposes of this act be deemed to be upon the flag.

The purpose of this statute, as declared in the title of the act of 1913, is "to prohibit the misuse of the national and the state flags." It should be interpreted in the light of this purpose with a view to increase respect for our flags and, if possible, not in such a manner as to restrict the proper use of the flags or to reduce the statute to an absurdity. It apparently seeks to prohibit three things, namely, first, insults to the flags; second, their use as a part of any form of advertising, and third, the engraving or printing of a representation of the United States flag upon any article of merchandise or any wrapper or receptacle of articles.

Acts coming within the first prohibition are readily recognized. The extent of the prohibition of the use of the flags for advertising purposes is indicated with reasonable plainness by the last sentence of the statute, added by the amendment of 1914. The chief difficulty comes in applying the third prohibition. It forbids the exhibition, manufacture, sale, exposure for sale, gift or possession for any purpose of "any article or substance,

being an article of merchandise or a receptacle of merchandise or articles upon which shall be attached through a wrapping or otherwise engraved or printed in any manner, a representation of the United States flag." The broad term "any article or substance" is somewhat limited by the words immediately following, "being an article of merchandise or a receptacle of merchandise or articles." In a broad sense, however, a card or a sheet of paper upon which a picture of a flag has been printed, or a piece of cloth upon which the colors constituting it have been stamped, is an article of merchandise. Obviously, it would seem that the Legislature never intended to use the language of this statute in any such broad sense. Such an interpretation would make it a criminal offence to possess or to display not only any picture of the flag whatever, but even the flag itself in many of its cheaper and more common forms. Such an interpretation would prohibit the use, not merely the misuse, of the flag, and would reduce the statute to a manifest absurdity. Thus interpreted the statute would probably be void as an unreasonable police regulation.

In my opinion the clause under discussion must be read together with the preceding clause forbidding the use of the flag for advertising purposes, and is to be considered merely as an extension of that prohibition. It should be interpreted merely as forbidding the engraving or printing of the flag, whether for advertising or decorative purposes, upon wrappers or receptacles, or upon articles which are themselves complete articles of merchandise aside from the presence of a representation of the flag upon them. Thus an article of which the representation of the flag is an inherent part, which could not be the complete article intended without the representation of the flag, and to which the representation of the flag is not a mere ornamental and unessential addition, does not, in my opinion, come within the prohibition of the statute. Unless such an article violates some other portion of the statute its possession or use is not forbidden.

It follows that a picture or printed representation of the flag alone, or a picture containing it as a *bona fide* part of the

picture, as, for example, displayed upon a building, is not a violation of this statute when engraved or printed upon a card or in or upon a book, paper or magazine, provided such picture is not used or intended to attract attention to or advertise such book, paper, magazine or card or its contents, or any other thing or matter. Accordingly, I advise you that the picture postcards submitted by you to me, one bearing merely a representation of the flag entitled "Old Glory," and the others being pictures of actual buildings upon which one or more flags are displayed, as they do not appear to be used for any advertising purpose, are not in violation of law.

The use of pictures containing representations of the flag upon the covers of books, papers or magazines will often present a question of some difficulty. Such pictures, so used, do not necessarily come within the third prohibition of the statute as interpreted by me. Thus they do not violate its terms unless they are used or intended for advertising as defined in the statute. If such a picture is used or intended solely for artistic or ornamental purposes, and is in no way used or intended to attract attention to the book, paper or magazine or its contents as it is offered for sale, there is, in my opinion, no violation of the law. If, however, any part of the use or purpose of such a cover is to attract attention to and advertise the publication or its contents, the second prohibition of the statute has been violated. Each case must stand by itself.

With reference to the cover of the Boston Sunday Post Magazine of July 4, 1915, submitted to me, it is my opinion that it was not a violation of law. Though its date indicates that it was intended to give a patriotic flavor to the publication, there is, in fact, no representation of the United States flag printed upon it. Red and white stripes with no field of blue or stars cannot be said to be such a representation when it is not obvious that it is intended to depict a portion of the flag. The cap represented on this cover may have been made of any piece of goods colored as indicated. It is the flag itself, not the colors that compose it, that the statute is devised to protect.

BOARDS OF HEALTH — PERSONS SUFFERING WITH DANGEROUS
DISEASES — NOTICE TO COMMONWEALTH IN CASES OF
PERSONS WITHOUT SETTLEMENTS.

Under St. 1902, c. 213, as amended by St. 1909, c. 380, if a person afflicted with tuberculosis goes to a State sanatorium for treatment after the notices required by these statutes have been given to the State Department of Health and the State Board of Charity, and then subsequently is discharged and returns to his place of domicile, the local board of health is not required to give further notice to the State Department of Health, unless the patient has been discharged as cured or in such a condition that at the time of his discharge he is not a source of contagion or infection.

After a physician has once reported a case of tuberculosis to the local board of health, in the event that the patient leaves the city or town temporarily, he is not obliged under the provisions of law, when the patient returns, to report the case again to the local board of health, nor is the latter obliged so to report it to the State Department of Health.

To the State
Department
of Health.
1915
August 12.

I beg to acknowledge the receipt of your letter in which you submit to me the following questions for my opinion: —

1. Whether cases of tuberculosis recognized as "continuing cases," once reported to the local board of health and by the local board of health immediately to the State Board of Health, are required to be reported a second time in the event of their receiving treatment in a State sanatorium; in other words, whether the original notice to the local board of health and by the local board of health to the State Board of Health is sufficient for the compliance of the laws so far as the notification requirement to the State Board of Health is concerned.

2. Whether a physician after once reporting a case of tuberculosis to the board of health of the town of which the patient is resident, in the event of the patient leaving the town for awhile, is obliged under the provisions of law when the patient returns to the town, provided the patient continues under the care of the same physician, to report the case again to the local board of health, and the said local board again obliged to report the case to the State Board of Health.

R. L., c. 75, § 57, which is referred to in your communication, was repealed by St. 1902, c. 213, and St. 1902, c. 213, was amended by St. 1907, c. 386, and further amended by St. 1909, c. 380, which states the law as it at present exists. St. 1909, c. 380, amends St. 1902, c. 213, § 1, so as to read as follows: —

Reasonable expenses incurred by the board of health of a city or town or by the commonwealth in making the provision required by law for

persons infected with smallpox or other disease dangerous to the public health shall be paid by such person or his parents if he or they be able to pay, otherwise by the city or town in which he has a legal settlement, upon the approval of the bill by the board of health of such city or town or by the state board of charity; and such settlements shall be determined by the overseers of the poor, and by the state board of charity in cases cared for by the commonwealth. If the person has no settlement, such expense shall be paid by the commonwealth, upon the approval of bills therefor by the state board of charity. In all cases of persons having settlements, a written notice sent within the time required in the case of aid given to paupers, shall be sent by the board of health, or by the officer or board having the powers of a board of health in the city or town where the person is sick, to the board of health, or to the officer or board having the powers of a board of health in the city or town in which such person has a settlement, who shall forthwith transmit a copy thereof to the overseers of the poor of the place of settlement. In case the person has no settlement, such notice shall be given to the state board of health, in accordance with the provisions of section fifty-two of chapter seventy-five of the Revised Laws, and also in any case liable to be maintained by the commonwealth when public aid has been rendered to such sick person, a written notice shall be sent to the state board of charity, containing such information as will show that the person named therein is a proper charge to the commonwealth, and reimbursement shall be made for the reasonable expenses incurred within five days next before such notice is mailed, and thereafter until such sick person is removed under the provisions of chapter three hundred and ninety-five of the acts of the year nineteen hundred and four, or is able to be so removed without endangering his or the public health.

I assume that tuberculosis is a disease dangerous to the public health within the meaning of R. L., c. 75, § 52, and St. 1909, c. 380. Said chapter 380 makes it clear that the Commonwealth is to reimburse the cities and towns until the sick person is removed, under the provisions of St. 1904, c. 395, or "is able to be so removed without endangering his or the public health."

St. 1904, c. 395, was amended by St. 1909, c. 391, so as to read as follows:—

The state board of charity may, if found expedient, remove any person who is infected with a disease dangerous to the public health, and who is maintained or liable to be maintained by the commonwealth, to any

hospital provided for state paupers, or may provide such place of reception for such person as is judged best for his accommodation and the safety of the public, which place shall be subject to the regulations of the board, and shall have the same authority to remove such persons thereto as is conferred upon boards of health by the provisions of section thirty-six of chapter seventy-five of the Revised Laws, as amended by chapter three hundred and sixty-five of the acts of the year nineteen hundred and six.

St. 1909, c. 380, is very clear with the exception of the provision, "or is able to be so removed without endangering his or the public health." Obviously, it was not the intent of the Legislature by this provision that the State Board of Charity should elect whether to remove the patient, under the provisions of St. 1909, c. 391, and thereby determine the liability of the Commonwealth. It cannot be that because the State Board of Charity finds a patient in a condition that prohibits his removal, and later neglects to remove the patient when his condition permits, the liability of the Commonwealth to reimburse the city or town terminates with its neglect. It is my view that the provision, "or is able to be so removed without endangering his or the public health," refers to the condition of the sick person at the time when the danger of infection or contagion is at an end. The result is, in my opinion, that after the proper notices have been sent to the State Department of Health and State Board of Charity, the Commonwealth is liable to reimburse the city or town for the reasonable expenses incurred by the board of health of the city or town in making the provision required by law for persons infected with diseases dangerous to the public health, until the sick person is removed under the provisions of said St. 1909, c. 391, or the danger of infection or contagion is at an end.

Where a person afflicted with the disease of tuberculosis goes to a State sanatorium for treatment, after the proper notices have been given to the State Department of Health and the State Board of Charity, and then subsequently is discharged from the State sanatorium and returns to his place of domicile, I am of the opinion that the local board of health is not re-

quired to give further notice to the State Department of Health, unless the patient has been discharged as cured or in such a condition that at the time of his discharge he was not a source of contagion or infection. Where a person leaves the place of his domicile temporarily for business, pleasure or health he does not lose his domicile in such place; and it would follow that ordinarily in cases of the kind to which you refer, the patient in the State sanatorium still retains his domicile in the city or town where he had his abode at the time he entered the State sanatorium, and there is no more necessity, in my judgment, for a notice to the State Department of Health upon his return from the State sanatorium than upon his return from a week's absence from the place of his abode on business or pleasure.

My reasons for the answer given to your first question apply to the second question, and, in my judgment, the question must be answered in the negative. There appears to be no reason why the physician must notify the local board of health in a case such as you describe, any more than there would be to require a physician to notify the local board of health of finding a case of tuberculosis on each visit to his patient.

I am aware that the Honorable Dana Malone, a predecessor in this office, on Jan. 8, 1910, rendered an opinion to the superintendent of the State Adult Poor that, where a patient infected with tuberculosis escaped from the State Infirmary and returned to the place from which he had been sent to the State Infirmary, the Commonwealth was not responsible unless a new notice was sent to the State Board of Charity. The facts in that case were substantially different from the facts stated in your request for an opinion, and I do not intend by this opinion to intimate in any way that my view of the law upon the facts upon which Mr. Malone rendered his opinion would be other than he there expressed.

PUBLIC SERVICE COMMISSION — COMMONWEALTH PIER — INTRASTATE SHIPMENTS — ALLEGED DISCRIMINATION IN RATES BY RAILROAD.

The shipment of imported merchandise to the Commonwealth Pier, consigned by the carrying steamer to Boston business houses and shipped by them in whole or in part from the pier to points within the State, does not constitute an intrastate shipment unless the Commonwealth Pier was intended to be the ultimate destination, and a reshipment of the goods from the pier to an intrastate point was determined upon only after the arrival of the goods in port.

The Attorney-General declines to advise the Public Service Commission upon an assumption inconsistent with the contention being made by him before the Supreme Judicial Court and the Interstate Commerce Commission.

To the
Public Service
Commission.
1915
August 30.

I beg to acknowledge receipt of your communication requesting my opinion upon certain questions in relation to an order made by your commission on March 29, 1915, to the Boston & Maine Railroad, and the action of the Boston & Maine Railroad in response to said order. Said order, as appears by your letter, is as follows: —

Ordered, That the respondent, the Boston & Maine Railroad, be directed to file with this commission within thirty days from the date hereof, tariffs to become effective thirty days after filing, unless otherwise ordered by the commission, which will discontinue the unjust discrimination which the commission in these proceedings has found to exist, in so far as such discrimination arises from the rates charged by the Boston & Maine Railroad on intrastate movements of freight to and from the premises of the petitioner from and to points on the Boston & Maine Railroad in Massachusetts, as compared with the rates on like traffic between the Commonwealth Pier in South Boston and the same points.

As stated in your letter, the Boston & Maine Railroad, in response to said order, under date of May 14, 1915, effective May 17, 1915, issued a new tariff, designated Supplement A, to the Massachusetts Public Service Commission No. 1063, which provided that "rates made in this tariff will not apply on intrastate traffic to or from points in Massachusetts."

Under date of May 19, 1915, effective June 20, 1915, the Boston & Maine Railroad also issued Supplement I. to the Interstate Commerce Commission No. 426, Massachusetts Public

Service Commission No. 1063. This latter supplement provided in effect that both interstate and intrastate movements of traffic to or from the Commonwealth Pier should thereafter be subject to the customary switching charges. Thereafter, as will appear later in this letter, the Supreme Judicial Court of this Commonwealth issued a temporary injunction restraining the Boston & Maine Railroad from putting these tariffs into effect.

Your questions are as follows: —

1. If imported merchandise shipped to the Commonwealth Pier is consigned by the carrying steamer to Boston business houses, and shipped by them, in whole or in part, from the Commonwealth Pier to Boston & Maine points in Massachusetts, does this transaction involve "an intrastate movement of freight" within the meaning of the commission's order of March 29, 1915?

2. Has the Boston & Maine Railroad, by filing the tariff supplements hereinbefore referred to, adequately complied with the said order of the commission?

3. If the answer to question No. 2 is "No," has the commission the authority to order the Boston & Maine Railroad to file a new tariff providing, in effect, for the absorption of switching charges on intrastate movements of import and export traffic to and from the docks of the National Dock and Storage Warehouse Company, (a) if the rates provided for in such new tariff, eliminating the question of discrimination, are otherwise reasonable, and (b) if such rates, eliminating the question of discrimination, are otherwise unreasonable?

The answer to your first question is dependent upon the facts of each particular shipment.

When freight actually starts in the course of transportation from one State to another it becomes a part of interstate commerce. The essential nature of the movement and not the form of the bill of lading determines the character of the commerce involved. And generally when this interstate character has been acquired it continues at least until the load reaches the point where the parties originally intended that the movement should finally end. *Ill. Cent. R.R. Co. v. La. R.R. Com.*, 236 U. S. 157, at 163.

And again, in *Texas & N. O. R.R. Co. v. Sabine Tram Co.*, 27 U. S. 111, at 126, the Supreme Court of the United States said: —

The determining circumstance is that the shipment of the lumber to Sabine was but a step in its transportation to its real and ultimate destination in foreign countries. In other words, the essential character of the commerce, not its mere accidents, should determine. It was to supply the demand of foreign countries that the lumber was purchased, manufactured and shipped, and to give it a various character by the steps in its transportation would be extremely artificial. Once admit the principle, and means will be afforded of evading the national control of foreign commerce from points in the interior of a State. There must be transshipment at the seaboard, and if that may be made the point of ultimate destination by the device of separate bills of lading, the commerce will be given local character though it be essentially foreign.

It is thus clear that neither the form of the bill of lading nor incidental delays are determinative of this question, but that it depends upon the real and essential nature of the movement. See also *So. Pac. Term. Co. v. Interstate Commerce Commission*, 219 U. S. 498, and *Ohio Ry. Commission v. Worthington*, 225 U. S. 101.

The nature of the movement involved in this particular case depends upon whether the shipment from the Commonwealth Pier to intrastate points is fairly separable from the shipment of the goods from abroad to the pier, having in mind the substance and not the formalities of the transaction.

In my opinion, if, before the arrival in port of goods shipped from abroad to the Commonwealth Pier, the intention or understanding of the parties is that their ultimate destination is to be another intrastate point, a shipment in pursuance of such intention is to be considered as a part or a continuation of a foreign shipment, and does not constitute an intrastate movement.

On the other hand, if the Commonwealth Pier was intended to be the ultimate destination, and a reshipment of the goods from the pier to an intrastate point was determined upon only after the arrival of the goods in port, I am of the opinion that the shipment from the pier to such intrastate point is intrastate in its character within the meaning of your order of March 29, 1915, and it is immaterial that the goods came originally from outside the Commonwealth.

But, from the nature of things, Commonwealth Pier itself cannot, in the vast majority of instances, be intended as the ultimate destination. The buyer does not, ordinarily, come into possession or control of the goods until they reach some other point. And as it appears that there are no storage facilities, properly so-called, at the pier, and that goods received from abroad can remain there only a short time, it would seem that, generally speaking, some other destination must have been in the contemplation of the parties before the arrival of the goods in port.

Applying the above principles to this particular case, the practical result is that, as a general rule, at least, such shipments from the pier to intrastate points retain their foreign character and are, therefore, not within the jurisdiction of your commission, although there may be isolated cases, as above indicated, where it would be otherwise.

An answer to your second and third questions involves some embarrassment.

The Commonwealth has brought a bill in equity in the Supreme Judicial Court, seeking to compel the Boston & Maine Railroad and the New York, New Haven & Hartford Railroad Company to comply with the terms of a certain contract dated July 1, 1912, in which suit the Commonwealth contends that the railroads agreed that the flat Boston rates of the Boston & Maine Railroad should apply to goods shipped to and from Commonwealth Pier.

One of the contentions of the Commonwealth in this suit is that no unlawful discrimination was created by this contract, and on application by the Commonwealth a preliminary injunction has been issued enjoining the Boston & Maine Railroad from putting into effect tariffs which, if they had been permitted to become effective, would have removed any possible claim of discrimination.

Furthermore, at the request of the Directors of the Port of Boston and of His Excellency the Governor, the Commonwealth, through the Attorney-General, has intervened in a petition brought by the National Dock and Storage Warehouse Company

before the Interstate Commerce Commission, praying for the discontinuance of an alleged discrimination which they contend is imposed upon them by reason of the absorption by the Boston & Maine Railroad of switching charges between the Commonwealth Pier and the Boston & Maine Railroad in Boston.

The position of the Commonwealth in these proceedings is that no unlawful discrimination was created by said contract and the acts of the railroad in pursuance thereof.

Since an answer to your remaining questions would involve an assumption that an unlawful discrimination in fact does exist, I do not deem it appropriate for me to advise you thereon at the very moment when, in the interest of the Commonwealth, I am contending before the Interstate Commerce Commission that that assumption is contrary to fact, and especially at a time when it might be claimed that the injunction issued by the Supreme Judicial Court was in part based upon a determination contrary to such assumption.

I am strengthened in this view for the reason that but few shipments would be in any event involved in any further order made by your commission. As indicated in my answer to the first question, substantially all the shipments *to* the National Dock and Storage Warehouse Company Pier must necessarily be destined for water transportation and consequently must be interstate or foreign movements, and relatively few *from* said pier would be intrastate. See *So. Pac. Term. Co. v. Interstate Commerce Commission*, 219 U. S. 498, and *O. Ry. Commission v. Worthington*, 225 U. S. 101.

CONSTITUTIONAL LAW — TAXATION — PUBLIC PURPOSE — CONSTRUCTION OF DRY DOCK.

The construction and operation of a dry dock in Boston Harbor by the Commonwealth in accordance with St. 1911, c. 748, and Spec. Acts, 1915, c. 335, is a public purpose for which money may be raised by taxation, and is not in violation of Article X. of the Declaration of Rights.

You have asked my opinion upon the following question: —

To the
Governor
and Council.
1915
September 14.

Whether or not there is any constitutional objection to the construction and operation by the State of a dry dock for repairing and overhauling vessels owned by persons and corporations other than the State, who shall pay the State compensation therefor.

I understand that the "operation" of the dry dock contemplated by your question consists of the cradling of the vessels preparatory to the work of repairing and overhauling by the owners or persons to be employed by them.

A consideration of your question must be based upon the fact that, by virtue of the provisions of chapter 335 of the Special Acts of 1915 and chapter 748 of the Acts of 1911, the Legislature has authorized the construction of a dry dock and the expenditure of the public moneys therefor. Furthermore, it must be based upon the definite proposition now before you for approval, namely, the construction of a dry dock "equipped with modern facilities and appliances sufficient in size for the accommodation of any modern steamship." I do not understand that up to the present time private enterprise has constructed and equipped, nor that there is any reasonable expectation that it will construct and equip, in Boston Harbor, a dock possessing the magnitude and affording the facilities which the Legislature believes necessary to the development of the resources of the Commonwealth and the preservation of her industrial and commercial prosperity. The proposition, therefore, is this: Do the acts of the Legislature, above referred to, authorizing the expenditure of the State's moneys raised by taxation for the construction and operation of such a dry dock in Boston Harbor, constitute a violation of Article X. of the

Declaration of Rights, providing that "no part of the property of any individual can, with justice, be taken from him, or applied to public uses, without his own consent or that of the representative body of the people?" This provision has been held to mean that the property of the individual can be taken only for a public purpose. *Talbot v. Hudson*, 16 Gray, 417. "This is equally true whether the property is a dwelling house taken by right of eminent domain, or money demanded by the tax collector." *Opinion of the Justices*, 182 Mass. 606.

The legislative adjudication of the wisdom of constructing a dry dock carries with it a presumption in favor of its constitutionality, which can be overthrown only upon the clearest proof. "Courts are bound to presume the existence of those circumstances which will support it and give it validity." *Wellington, Petr.*, 16 Pick. 96; *Opinion of the Justices*, 8 Gray, 21; *Talbot v. Hudson*, 16 Gray, 417. "The purposes of the act as declared therein, its general structure, the nature of its provisions, its probable operation and effect are all to be considered in determining whether it is a lawful exercise of legislative power."

To apply these principles of interpretation to the question before us, what are the declared purposes of the legislative act? They are expressed in the title to chapter 748 of the Acts of 1911, "An Act relative to the development of the port of Boston." They are expressed in section 2, providing that "the Directors of the Port of Boston shall be the administrative officers of the port, shall cause to be made all necessary plans for the comprehensive development of the harbor," etc. They are expressed in section 12, which makes it one of the duties of the Directors forthwith "to make, and, so far as may be practicable, to put into execution, comprehensive plans providing on the lands now owned or hereafter acquired by the Commonwealth in the area described in section four of this act, adequate piers, capable of accommodating the largest vessels, and in connection with such piers suitable highways, waterways, railroad connections and storage yards, and sites for warehouses and industrial establishments," and requires a report of "all necessary plans and estimates of cost for the construction of a dry

dock equipped with modern facilities and appliances, sufficient in size for the accommodation of any modern ocean steamship." They are expressed in section 5 which, by the act first referred to, includes a dry dock providing for "the constructing, or securing the constructing or utilizing of, piers and, in connection therewith, highways, waterways, railroad connections, storage yards and sites for warehouses and industrial establishments," etc. In short, the purposes of the legislative acts include the comprehensive development and improvement of the principal harbor of the Commonwealth as a gateway through which the products of Massachusetts industry and the articles of her commerce may come and go to the greatest advantage of her citizens. They include the improvement of that system of transportation, both by water and land, for those products and those articles upon which the prosperity of our citizens depends.

The improvement of Boston Harbor is no new field for the legitimate expenditure of public money. In the case of *Moore v. Sanford*, reported in 151 Mass. 285, in passing upon the constitutionality of an act providing for the condemnation of flats in Boston Harbor, and the filling, improving and ultimate sale of them, — a purpose which inevitably to some extent entered the field of private enterprise, — the Supreme Judicial Court said the act "was for the avowed purpose of improving the harbor of Boston and also of providing better and more accommodations for the railroad and commercial interests of the city by the solid land which would take the place of the flats over which the tide ebbed and flowed;" and further, "that the improvement of Boston Harbor is an object of a public nature, and thus that lands taken for this purpose are taken for a public use can hardly be controverted."

In commenting upon this case in *Opinion of the Justices*, 204 Mass. 607, the same court refers to it as a case which "rests upon the ground that the work done was in a true sense for the promotion of commerce, through its direct and close relation to the improvement of Boston Harbor in making connections between the great highways used for interstate commerce and the numerous ships that are passing back and forth between

Boston and foreign ports. All that was done was held to be fairly incidental to the main purpose of promoting commerce between the United States and distant countries. The improvement of harbors and the construction of public docks, wharves, and possibly of warehouses, to be used under governmental authority as a part of the facilities for the transportation of merchandise in commercial enterprises, and the building of railroads to be used for the same object, may all affect the public so directly as to constitute a public purpose for which money raised by taxation may be expended."

In my judgment the development and improvement of the port of Boston is a purpose for which the Legislature may constitutionally authorize the use of the public moneys. The advisability or wisdom of appropriating them to such a use is a matter entirely within the discretion of that body. It is within the power of the Legislature to determine further that a dry dock may be an essential part of the improvement of the harbor, and even necessary to its full development. But whether the benefits hoped for justify the expenditure of any of the moneys so appropriated for the particular dry dock now in question before the Governor and Council, as an essential part of such development and improvement, is a question the responsibility for answering which the Legislature has placed upon the Directors of the Port and yourselves.

DIRECTORS OF THE PORT OF BOSTON — POWERS — LICENSE TO BUILD STRUCTURE IN TIDE WATERS — CITY OF BOSTON.

The Directors of the Port of Boston have authority, with the approval of the Governor and Council, under R. L., c. 96, as amended by St. 1911, c. 748, § 4, to license the building by the city of Boston of a structure within the boundary of the property granted to it by Spec. Acts, 1915, c. 326.

To the
Directors of the
Port of Boston.
1915
September 17.

You have called my attention to chapter 326 of the Special Acts of 1915, whereby the harbor line in Boston Harbor at Fort Point Channel is changed by advancing it approximately 50 feet southeasterly from Dorchester Avenue for a distance of 1,500 feet, and the city of Boston is authorized to build

a sea wall on the new line "and to fill solid, without payment of compensation for land of the commonwealth or for the displacement of tide water, the area enclosed by said sea wall for the purpose of constructing a high pressure fire pumping station;" and is further authorized "to hold, lease, sell or use . . . so much of said area as is not appropriated" to this purpose; and to the further fact that the city of Boston has applied to your Board for a permit to build a structure 60 by 200 feet at the corner of Dorchester Avenue and Summer Street. This application, therefore, requests a permit to build 10 feet outside of the harbor line as established by said act.

You have since informed me, however, that the city of Boston has withdrawn its request as to this 10 feet and is now applying for a license only as to territory within the new harbor line.

On this state of facts you have requested my opinion as to whether your Board has authority to grant a permit for a location within the boundary of the property granted by the Legislature to the city of Boston.

St. 1911, c. 748, § 4, confers upon your Board all the rights, powers and duties pertaining to the Board of Harbor and Land Commissioners, in general, with respect to the port of Boston. Under section 2 of said act your Board is given immediate charge of the lands now or hereafter owned by the Commonwealth upon or adjacent to the harbor front, with certain exceptions, "and of the construction of piers and other public works therein."

The powers of the Harbor and Land Commissioners pertinent to the question raised by you are set forth in R. L., c. 96, §§ 14, 16 and 17. Section 14 provides, in part, that if harbor lines are established by the General Court "no wharf, pier or other structure shall thereafter be extended into said harbor beyond such lines." Section 17 provides:—

Said board may license and prescribe the terms for the construction or extension of a wharf, pier, dam, sea wall, road, bridge or other structure, or for the filling of land or flats, or the driving of piles in tide water below

high water mark, but not, except as to a structure authorized by law, beyond any established harbor line, nor unless with the approval of the governor and council, beyond the line of riparian ownership.

Accordingly, it would seem clear that your Board has authority to grant a petition to build any structure within the established harbor lines.

Your doubt apparently arises from the fact that section 2 of chapter 326 of the Special Acts of 1915 directly authorizes the city to build a sea wall and fill solid the area for the purpose stated.

While it is undoubtedly open to the city to proceed under this statute, with the approval of your Board under R. L., c. 96, § 16, if the city of Boston wishes to go further, and, disregarding the authority granted to it by the special act of 1915, seeks a license from your Board under R. L., c. 96, § 17, such course would seem to be open, subject to the limitation against any structure "beyond any established harbor line." I cannot believe that in enacting the aforesaid special act of 1915 there was any intention on the part of the Legislature of abrogating or limiting the powers conferred by R. L., c. 96, § 17. A special act such as this would not by implication repeal a general law unless there was an absolute inconsistency. There seems to be nothing inconsistent in your Board granting a license to do something which the Legislature has approved, nor in the city of Boston taking the position that it does not choose to accept the special grant of the Legislature, but chooses to proceed under the general laws.

If the city elects to follow this course there may be considerable doubt as to whether it is not thereby debarred from accepting the privileges conferred by the 1915 act; but upon that point no opinion at present seems required.

In dealing with such a petition, however, your Board is not acting under the special act of 1915, since no powers are conferred upon you thereby, but under the provisions of section 23 of chapter 96 of the Revised Laws that, —

The amount of tide water which is displaced by any structure below high water mark, or by any filling of flats, shall be ascertained by the

board, which shall require the persons who cause such displacement to make compensation therefor by excavating, under its direction, between high and low water mark in some part of the same harbor a basin for a quantity of water equal to that displaced; or by paying in lieu of such excavation an amount assessed by said board, not exceeding thirty-seven and one-half cents per cubic yard of water displaced; or by improving the harbor in any other manner satisfactory to the board; and the money shall be paid into the treasury of the commonwealth, and be reserved as a compensation fund for such harbor. The income thereof may be used under the direction of the board for the improvement of the harbor. An assessment for tide water which has been displaced may be recovered in an action of contract in the name of the treasurer and receiver-general.

As I understand that the city does not have title to the territory in question, such license can only be granted with the approval of the Governor and Council.

It will also be necessary for the city to comply with the requirements of section 24, providing that in addition to such compensation for displacement of tide water as may be fixed by your Board compensation for rights granted in land the title to which is in the Commonwealth shall be paid in such sum as may be determined by the Governor and Council.

Answering specifically the question put, I am of the opinion that the Directors of the Port of Boston have authority to license the building of a structure, as described, within the boundaries of the property referred to in chapter 326 of the Special Acts of 1915.

PRISON COMMISSION — MALE LABORERS — WAGES.

St. 1914, c. 458, providing that "the wages paid by the board of prison commissioners to male laborers directly employed by it shall not be less than two dollars and a half a day," applies to all male laborers employed at the Reformatory for Women.

I acknowledge your letter requesting my opinion as to whether chapter 458 of the Acts of 1914 applies to male employees at the Reformatory for Women.

To the Board
of Prison Com-
missioners.
1915
September 20.

Section 1 of this statute is as follows: —

The wages paid by the board of prison commissioners to male laborers directly employed by it shall be not less than two dollars and a half a day.

You call my attention to the fact that under section 30 of chapter 223 of the Revised Laws the superintendent of this institution alone is appointed by the Prison Commissioners. All other officers and employees are appointed by the superintendent and hold their offices during her pleasure. This is the same rule which is in force in all the other institutions under the control of your Board. It is true, therefore, that, strictly, the laborers in question are not hired or appointed by your Board but by a public officer appointed by you and removable at your pleasure. Yet these laborers are in the service of the Commonwealth in an institution under the control of your Board. If they are not to be considered as employed by you, within the meaning of this statute, then the statute has no effect whatever, since in that case it would apply to no one. It must be interpreted in such a manner as to give to it a reasonable effect and to carry out what was apparently the intention of the Legislature. In my opinion the word "directly" was used to indicate persons directly in the service of the institutions under your control, as distinguished from persons in the service of contractors performing work under contracts with your Board. On the whole, it is my opinion that this statute applies to the laborers in question.

CIVIL SERVICE — CONVICTION OF CRIME AGAINST LAWS OF
COMMONWEALTH — VIOLATION OF TRAFFIC REGULATIONS.

A person convicted of allowing his automobile to remain standing on a public highway in Boston for more than twenty minutes in violation of a traffic regulation established by the board of street commissioners of that city has not been convicted of a crime against the laws of the Commonwealth within the meaning of R. L., c. 19, § 17.

To the
Civil Service
Commission.
1915
September 24.

You have requested my opinion upon the question of whether or not the conviction of a person for allowing his automobile to remain standing on Tremont Street, Boston, for more than twenty minutes is the conviction of a crime within the meaning of section 17 of chapter 19 of the Revised Laws and Civil Service Rule 8.

R. L., c. 19, § 17, provides as follows: —

No person shall be appointed to or employed in any office to which the provisions of this chapter apply within one year after his conviction of any crime against the laws of this commonwealth.

Civil Service Rule 8 is as follows: —

No application for appointment will be accepted from . . . any person who within the year preceding his application has been convicted of any crime against the laws of this commonwealth; and the name of any such person may be removed from any eligible list.

The act of which this applicant was found guilty was not in violation of any statute of this Commonwealth nor of any ordinance passed by the city council of the city of Boston, but was in violation of section 11 of Article V. of the street traffic regulations promulgated by the board of street commissioners of the city of Boston. Such a rule can stand in no more favorable position than an ordinance itself.

The question as to how far and to what extent proceedings for violations of the ordinances of municipal corporations are to be regarded as prosecutions for crime presents a question of considerable nicety. In many States they are held to be civil or penal actions (*State v. Robitshek*, 60 Minn. 123; *Greeley v. Hamman*, 12 Colo. 99; and *People v. Jackson*, 8 Mich. 110) although in this Commonwealth they are treated for some purposes as criminal in their nature. *In re Goddard*, 16 Pick. 504; *Commonwealth v. Worcester*, 3 Pick. 462, 474.

The issue here, however, is not whether the violation of such an ordinance or by-law is essentially a public wrong, but whether such violations were intended to be included in the disqualifying provisions above quoted.

In many jurisdictions, although not in Massachusetts, the question has arisen as to whether under a statute such as our R. L., c. 175, § 21, which provides that the conviction of a witness of a crime may be shown to affect his credibility, the conviction of a person for a violation of a municipal ordinance may be shown, and the courts have uniformly held that it

cannot. *State v. Crawford*, 58 Ore. 116; *Coble v. State*, 31 Oh. St. 100; *Koch v. State*, 126 Wis. 470, 478; *People v. Manistee Co.*, 26 Mich. 422; *Gillman v. State*, 165 Ala. 135.

The question here is further simplified because the term used is not "*crime*," but "*crime against the laws of the Commonwealth*." The laws of the Commonwealth consist of its Constitution, statutes and common law. There is an obvious difference between such general laws and an ordinance or by-law of a municipal corporation. The latter is strictly local in its operation, and does not constitute a part of the law of the land. For example, although a court is bound to take judicial notice of the public laws of the State, it will not judicially notice a municipal ordinance or by-law. *O'Brien v. City of Woburn*, 184 Mass. 598; *Attorney-General v. McCabe*, 172 Mass. 417; *Mahar v. Steuer*, 170 Mass. 454.

For the above reasons I am of the opinion that a violation of the regulations of the board of street commissioners does not come within the purview of the acts above quoted, and that the applicant in question is not thereby disqualified.

REGISTERED PHARMACIST — OWNERSHIP OF STOCK IN CORPORATION — PAYMENT BY PROMISSORY NOTE.

The fact that a registered pharmacist holds a certificate of stock in a corporation formed to carry on a drug business, for which he has paid by giving to the corporation his personal note, does not necessarily make him an owner of such stock within the meaning of R. L., c. 100, § 22, as amended by St. 1913, c. 410. The question of *bona fide* ownership must be determined on the facts of each case.

If stock held by a registered pharmacist in such a corporation is mortgaged or pledged he is not an owner of it within the meaning of this statute.

You ask for an opinion as to whether a license may be granted to a registered pharmacist under R. L., c. 100, § 22, as amended by St. 1913, c. 410, if he submits a certificate of stock of the value of \$500 and states under oath that he has paid for the same by his personal note to the company.

The material portion of the statute referred to is as follows:—

A registered pharmacist who owns stock of the *actual value* of at least five hundred dollars in a corporation which has been incorporated for the purpose of carrying on the drug business, and who conducts in person the business of a store of such corporation, shall be considered as actively engaged in business on his own account, and as qualified to receive a license for such store.

In my judgment a Massachusetts corporation has no authority to issue stock in consideration of promissory notes made to it by the person to whom the stock is issued. Unless there is specific statutory authority to the contrary, the same holds true as to a foreign corporation. The burden is on any foreign corporation asserting such authority to satisfy your Board of the truth of the claim.

The legislative intent is clear, that a recipient of a license under this act must be a *bona fide* owner of stock to the value of \$500.

If a registered pharmacist actually owns such stock by a purchase in good faith, and holds it in his own name, and neither mortgages nor pledges the same, he is the owner of the stock, and is qualified to receive a license under the statute.

On the other hand, if the stock is mortgaged he is not the owner but merely has an equity, and the mortgagee is the holder of the legal title. If the stock is pledged the pledgee has a lien on the property. *Thompson v. Dolliver*, 132 Mass. 103. In neither case can the mortgagor or pledgor be said to own the stock within the meaning of the statute. Even the colorable transfer of the stock upon the books of the corporation to the pledgor or mortgagor will not qualify him as a licensee under the law. See *Baker's Appeal*, 108 Pa. St. 510, *re Argus Printing Company*, 1 N. D. 434, and cases cited. It is my opinion that it is the duty of your Board to require from each applicant for a license under the provisions of this statute satisfactory evidence that such applicant is in fact the true owner of stock in the corporation to the value of \$500.

MINIMUM WAGE COMMISSION — MINIMUM WAGE — FINES —
PAYMENTS TO COVER SICK BENEFITS — VACANCIES IN
WAGE BOARDS.

The payment by an employer of an amount less than the minimum wage prescribed by a decree of the Minimum Wage Commission constitutes a violation of that decree, and it may not be excused by showing that the prescribed sum has been reduced because of fines for misconduct or tardiness, or because of deductions on account of benefits to accrue to the employee in case of sickness.

It is doubtful if the Minimum Wage Commission has the power to fill a vacancy in a wage board arising after that board has been fully established and organized.

To the
Minimum Wage
Commission.
1915
October 5.

You have requested my opinion upon the following question: — "If any employer, who previous to complying with the decree of the Minimum Wage Commission recommending a minimum wage for women in his employ, deducts from the recommended minimum wage payable to a female employee, fines for misconduct or tardiness, or sums due on account of expected benefits to accrue in case of sickness, are such deductions violations of the decree?"

Under St. 1912, c. 706, as amended by St. 1913, c. 330 and c. 673, and St. 1914, c. 368, your Board is officially entitled the "Minimum Wage Commission," and its purpose, as stated in the title of the act, is "to provide for the determination of minimum wages for women and minors."

The purpose delineated in the title is borne out by the enactments of the law. The wage boards established "shall endeavor to determine the minimum wage, whether by time rate or piece rate, suitable for a female employee of ordinary ability, . . . and also suitable minimum wages for learners," etc. (section 5). The entire act shows an intention that the wages to be determined are the minimum wages for the occupation in question. It is only when the wages paid are inadequate "to supply the necessary cost of living and to maintain the worker in health" that the investigations of your Board become operative (sections 3, 4).

If the wages decreed by your Board may be diminished by

reason of fine or other excuse, the purpose of the act is defeated to a considerable extent.

It is to be noticed that the primary minimum wage is for a female employee of "ordinary ability." Such an employee is not of the highest skill, and may be expected naturally to make some mistakes, allowance for which must be presumed to have been made in determining the wage for that grade of ability. To reduce the wage fixed by deductions under whatever name is reducing the compensation below the sum fixed as a minimum.

The foregoing line of argument does not require that the employer pay the minimum wage fixed on the time basis for less time than the full period for which the rate is fixed. If an employee for whom a minimum wage has been determined on the basis of an eight-hour day should work but seven hours, she, of course, is entitled to pay for only the seven hours' work. I understand your question, however, to refer to an arbitrary amount above a *pro rata* deduction for the time lost imposed as a penalty or fine, and such action seems to be contrary to the spirit and terms of the act. Accordingly, I am of the opinion that the payment of an amount less than the minimum wage prescribed by a decree of your commission constitutes a violation of the decree, and may not be excused by a claim that the sum has been reduced because of fines for misconduct or tardiness, or of deductions on account of expected benefits to accrue in case of sickness.

You have also requested my opinion as to the proper procedure for filling a vacancy in the representation of employees in any industry upon a duly organized wage board.

There is nothing in the act giving specific authority to your commission to fill vacancies upon a wage board. Until a wage board has been organized I am of opinion that you may make appointments to take the places of persons appointed who may decline appointment, as this is simply an act incidental to creating the board. Where, however, the board has been organized and a vacancy occurs, I think it extremely doubtful if your commission has such power. In view of the fact that our authority to publish names of employers who do not

comply with the recommendations of a wage board as confirmed by your commission is dependent upon your compliance with the statute, I think it unwise for your commission to attempt to fill vacancies until such time as you may receive further legislative authority. No permanent injury can come to the interests of the employees by reason of such a vacancy, since it is in the discretion of your commission, under the provisions of section 6, to disapprove any or all recommendations made by such a board and to recommit the subject to a new wage board.

LICENSED ELECTRICIANS — LICENSED JOURNEYMEN — RIGHT TO
DO CONTRACT WORK — EMPLOYMENT OF LEARNERS OR
APPRENTICES.

A journeyman electrician duly licensed under Gen. Acts, 1915, c. 296, has the right, by contract or otherwise, to do the same class of work as is done by master electricians, provided that he does the work himself with his own hands and does not employ any journeyman to assist him, and he may in such work employ learners or apprentices working with him and under his direct personal supervision.

To the State
Examiners of
Electricians,
1915
October 6.

You have requested my opinion as to the interpretation to be placed upon chapter 296 of the General Acts of 1915, as set forth in the following questions:—

Can a journeyman who is licensed under the provisions of chapter 296 of the General Acts of 1915, by virtue of such license, agree to perform and do contract work in the installation of "wires, conduits, fixtures or other appliances for carrying or using electricity for light, heat or power purposes," provided that he does the work himself, with his own hands, and does not employ any journeymen to assist him?

Can a journeyman licensed under the provisions of chapter 296 of the General Acts of 1915 agree to perform and perform the same class of work, by contract or otherwise, as is completed and performed by the master electricians, provided he does the work with his own hands and does not employ any journeymen electricians to aid or assist him in the work?

Has a licensed journeyman electrician, under the provisions of chapter 296 of the General Acts of 1915, the right to perform and do work by contract or otherwise in the installation of "wires, conduits, fixtures or other appliances for carrying or using electricity for light, heat or power

purposes," provided that he does the same with his own hands; and has he the further right to employ learners or apprentices working with and under his direct personal supervision in the doing of such work?

The statute in question nowhere in express terms forbids a journeyman from making a contract to do, and, in fact, personally doing, the work in the installation of wires, conduits, fixtures or other appliances.

The restrictive provisions of the act are merely that "no person . . . shall engage in or work at the business of installing wires, conduits, etc., . . . either as a master or employing electrician or as a journeyman electrician, unless such person . . . shall have received a license."

The words "master or employing electrician" as used in this act "shall mean a corporation, firm or person, having a regular place of business, who, *by the employment of journeymen*, performs the work of installing wires," etc.

The word "journeyman" as used in this act "shall mean a person who does any work of installing wires, conduits, apparatus, fixtures and other appliances for hire." (Gen. Acts, 1915, c. 296, § 1.)

It is expressly provided that a master's certificate "shall not entitle the holder individually to engage in or perform the actual work of installing, . . . but shall entitle him to conduct business as an employing or master electrician."

A journeyman's certificate authorizes the person named "to enter upon or engage in the occupation of journeyman electrician," or, in other words, adopting the definition of section , to engage in "any work of installing wires, etc., . . . for hire."

A provision that a man licensed and certified to be competent to do the work in question could not lawfully do such work unless he was also licensed to employ others to do it, or without letting his services out to a licensed master electrician, would be such a limitation upon what have generally been recognized as fundamental rights of a citizen of this Commonwealth and country that it should not be read into a statute

unless clearly called for. The present statute, instead of containing such clear language, seems rather to countenance the opposite view, and accordingly I am of the opinion that all of your questions should be answered in the affirmative.

Your third question raises the inquiry as to whether a journeyman electrician contracting and doing the work of installation with his own hands and without employing other journeymen has "the further right to employ learners or apprentices working with and under his direct personal supervision in the doing of such work." Apart from the provisions of section 8 of the act it might be argued that such conduct would make him a "master or employing electrician," for which a master's certificate would be required.

Section 8, however, provides: —

Nothing in this act shall be construed as forbidding the employment of learners or apprentices working with and under the direct personal supervision of journeymen electricians duly certified as provided in this act.

This language is sweeping in its terms, and so long as its provisions are carefully complied with I am of the opinion that such employment by a journeyman would not subject him to the penalty provided.

The opinion of the Supreme Judicial Court in the case of *Burke v. Holyoke Board of Health*, 219 Mass. 219, to which you have referred, is a decision to the same effect as that given above upon a set of statutes somewhat analogous.

As stated above, accordingly, I am of the opinion that all of your questions are to be answered in the affirmative.

TAXATION — INCOME FROM ANNUITY — CONTRACT ISSUED BY
A SAVINGS BANK.

The income from an annuity contract issued by a savings bank under St. 1907, c. 561, is exempt from local taxation by the provision of section 24 of that statute, that "all insurance policies and annuity contracts issued by such banks shall otherwise be exempt from taxation."

I beg to acknowledge your request for an opinion as to whether the income from an annuity contract issued by a savings bank under the authority of St. 1907, c. 561, is taxable locally under the provisions of St. 1909, c. 490, Part I., § 4, cl. 4.

To the Tax
Commissioner.
1915
October 11.

The last-mentioned clause is as follows: —

The income from an annuity, and the excess above two thousand dollars of the income from a profession, trade or employment accruing to the person to be taxed during the year ending on the first day of April of the year in which the tax is assessed. Incomes derived from property subject to taxation shall not be taxed.

I know of no provision of law exempting from taxation the income from an annuity contract issued by an ordinary insurance company. It is plain, therefore, that the income from such an annuity is taxable under this clause; and it is plain from an examination of this clause in its present form, and particularly from an examination of it as it appeared in R. L., c. 12, § 4, that the exemption of \$2,000 made in cases of income from a profession, trade or employment does not apply to such an annuity. The annuity is taxable for its full amount.

By St. 1907, c. 561, savings banks were authorized under certain conditions and subject to the supervision of the insurance department to establish insurance departments and to issue from those departments life insurance contracts to an amount not exceeding \$500 and annuity contracts calling for a payment of not more than \$200 annually. The limitation upon the amount of a life insurance policy which such a department might issue was subsequently increased to \$1,000. (Gen. St. 915, c. 32.)

St. 1907, c. 561, § 24, provided that savings banks should pay tax upon funds held in or in connection with their insurance

departments "to the same extent and in the same manner as taxes are now payable on deposits held by the savings department." It provided that they should not be taxed otherwise, and then enacted, "All insurance policies and annuity contracts issued by such banks shall otherwise be exempt from taxation."

The real question, then, is whether this provision last quoted is sufficiently broad to exclude the income of annuity contracts issued by savings banks under this statute. Obviously there is a distinction between the present value of an annuity contract and the income payable annually to the holder of such a contract. If the language of section 24 is construed strictly it exempts from taxation only the former and not the latter.

It seems to me, however, that in view of the apparent purpose of St. 1907, c. 561, this provision should be given a broad construction. Without going into the details of the system of insurance created by that chapter it plainly seems to have been intended to establish an agency for issuing small life insurance policies and annuity contracts to citizens of this Commonwealth at a low cost and upon a sound financial basis. The statute provides that the Commonwealth itself, through furnishing the services of a State actuary and a State medical director and in other ways, shall bear a substantial portion of the expense of operating these agencies. Certain of the funds established for the foundation of these departments are held by trustees appointed by the Governor with the advice and consent of the Council. Though the Commonwealth is not strictly, through this means, engaging in the insurance business, it is aiding to a very substantial extent these agencies established by it for the purpose of providing sound insurance at a low cost to people of small means.

In view of these considerations and the small amount of income that can be paid under such annuity contracts, it does not seem to me reasonable that the Legislature intended that the contracts themselves should be exempt from taxation, while the chief incident of such contracts, namely, the annual annuity paid on account of them to their holders, should be subject

to taxation. Accordingly, in answer to your inquiry I state it to be my opinion that the income from such an annuity is not taxable locally under the provision of law to which you refer.

TAXATION — CORPORATION FRANCHISE TAX — MERCHANDISE
— TANGIBLE PROPERTY HELD IN PLEDGE.

Tangible personal property held by a Massachusetts corporation in pledge as security for money loaned by it is to be treated in determining its franchise tax as merchandise of the corporation, within the meaning of St. 1909, c. 490, Part III., § 43.

I beg to acknowledge your request for my opinion upon the question whether articles of personal property left in pledge at a collateral loan company's or pawnbroker's shop should be treated as merchandise or as bills receivable in assessing the corporate franchise tax. I understand that the question arises with reference to the assessment of the tax upon the Boston Loan Company for the year 1915; that its tax return shows an item of "accounts receivable, \$89,908.14," and that the Tax Commissioner treated this item as representing merchandise pledged for loans; and that in computing the tax under the maximum clause he used this item as the value of merchandise of the corporation.

To the Board
of Appeal in
Tax Matters.
1915
December 4.

As I understand it, this corporation loans money to its customers upon personal property pledged by them to it as security, and no notes are taken from the customers, the obligation to repay being treated merely as an ordinary item of bills receivable. The corporation issues at the time of the loan to the customer an ordinary certificate or ticket showing the amount and terms of the loan and the description of the property pledged.

Apparently no question is raised but that the personal property in question is merchandise within the meaning of St. 1909, c. 490, Part III., § 43. It is suggested, however, that this property is owned by the pledgors and not by this corporation, which has merely a special property in it as pledgee. This is undoubtedly true; but St. 1909, c. 490, Part I., § 26, as

amended, in dealing with the local taxation of such property, provides:—

Personal property mortgaged or pledged shall, for the purpose of taxation, be deemed the property of the party in possession thereof on the first day of April. . . .

It is well settled that this section applies to tangible personal property only. *Waltham Bank v. Waltham*, 10 Met. 334; *Chase v. Boston*, 193 Mass. 522, 527. The property in question, therefore, if held upon the same terms and under the same circumstances by an individual engaged in the same business as this corporation, or by a foreign corporation (see *Boston Loan Co. v. Boston*, 137 Mass. 332), would be subject to a general property tax.

The word “merchandise” as used in section 43 includes all merchandise of a domestic corporation, whether taxable if owned by a natural person or not. *Farr Alpaca Co. v. Commonwealth*, 212 Mass. 156. But this section must, in my opinion, be interpreted with reference to section 26 of Part I., quoted above, and therefore it should be held that all merchandise which is to be treated as the merchandise of a natural person for the purposes of local taxation, is, when held by a corporation under the same conditions, to be treated as merchandise of the corporation for the purpose of determining the corporate franchise tax. It follows, in my opinion, that the personal property held by this corporation as pledgee was properly treated by the Tax Commissioner as merchandise within the meaning of section 43. It is to be noted, however, that such merchandise should be taxed at its actual value as determined by the Tax Commissioner, and not necessarily at the amount of the bills receivable which it is held to secure. The Tax Commissioner and your Board may properly take into consideration this item of bills receivable in determining the value of the property, but you may also consider other evidence upon that issue and fix the value of the property at an amount greater or less than the total of bills receivable, as the evidence may warrant.

INSURANCE — STOCK INSURANCE COMPANIES — PARTICIPATING POLICIES — RESTRICTION TO ONE CLASS OF INSURANCE.

A stock insurance company, other than a life insurance company, which is transacting, as permitted by law, several classes of insurance, may issue policies in one class which provide for a participation in the profits in that class by the holders of such policies, although at the same time it is issuing non-participating policies in other classes of insurance.

You have requested my opinion as to whether a stock insurance company other than life, transacting as permitted by law several classes of insurance, may issue policies in one class or line, such as workmen's compensation, which provide for distribution of part of the profits in that class among those who have been holders of like policies while the profits were being earned. In other words, may such a company issue participating policies and confine their issue to one class of insurance.

To the
Insurance
Commissioner.
1915
December 9.

There seems to be no provision of the statutes directly limiting the powers of such companies in such way as to prevent the issuance of the type of policy described.

It has been argued, however, that such policy would violate the provisions of St. 1912, c. 401, entitled, "An Act to prohibit discrimination or rebates of premiums for policies issued by insurance companies other than life." This act is a revision of St. 1908, c. 511, which is similarly entitled.

Section 1 of the 1912 act provides: —

No insurance company . . . shall pay or offer to pay or allow in connection with placing or attempting to place insurance any valuable consideration or inducement not specified in the policy contract of insurance, or any rebate of premium payable on a policy, or any special favor or advantage in the dividends or other benefits to accrue thereon; or give, sell or purchase or offer to give, sell or purchase in connection with placing or attempting to place insurance anything of value whatsoever not specified in the policy.

There can be no contention that the action proposed would constitute giving a valuable consideration not specified in the policy or a rebate of premium. It is suggested, however, that

if a company issuing several lines of policies permits a participation in the profits as to one line, it does thereby give a special favor or advantage in the dividends to accrue thereon.

On the supposition of facts made it would seem to be impossible to decide whether, as a matter of fact, the policy containing the dividend provision does grant any advantage over the other line, since the premium in the nonparticipating policy may be so low that no profits are or can be made thereon, while the premium on the participating policy may be made unnecessarily high, and the net result from the dividend provision be only the loss of use by the policy-holder of the extra amount of the premium which he may later get back in dividends.

However that may be, the argument presented disregards the language of the phrase, and particularly the use of the word "special." It does not seem to have been the intent of the Legislature to prevent the issuance of participating policies. On the contrary, the language appears to contemplate that there may be provisions calling for the payment of dividends, and it therefore prohibits the granting of any *special* favor or advantage therein. It is not dividends that are prohibited, but special favors in the dividends that are to accrue. In this connection "special" seems to be used in the sense of "peculiar or distinct of the kind; of exceptional character, amount, degree, or the like; especially distinguished; express; particular." (Century Dictionary.)

This clause must be read in connection with the title of the act and the other prohibitions, in order to arrive at its true meaning; and so read it must be some special favor or advantage in the dividends, of a character similar to or like the granting of rebates or payment of considerations not specified in the policy. The determination of a stock company to conduct its business of workmen's compensation insurance on a participating basis and its general liability on a nonparticipating basis partakes of none of these features. The evil sought to be eliminated is discrimination between individuals properly members of the same class, rather than difference between

properly separated classes. So long as a class is selected upon a reasonable basis I find nothing in this act which, in my opinion, prevents its being treated as such, and the function of the act is fulfilled in preventing discrimination between the members of such class.

It is to be observed that St. 1912, c. 401, and St. 1908, c. 511, are in the main but extensions to the remaining kinds of insurance companies of requirements long applicable to life insurance, and that the phrase in question has appeared in the statutes with reference to life insurance since 1887 (St. 1887, c. 214, § 68; St. 1907, c. 576, § 69). Yet down to 1908 it apparently was considered lawful for a stock company to issue life insurance policies on either or both a participating and nonparticipating basis (see St. 1907, c. 576, §§ 76, 81).

Accordingly, I am of the opinion that it is lawful for a stock insurance company other than life, which is transacting as permitted by law several classes of insurance, to issue policies in one class or line which provide for a participation in the profits in that class by the holders of such policies, although at the same time issuing nonparticipating policies in other classes of insurance.

INSURANCE — LIFE INSURANCE — ACCIDENT INSURANCE — TWO CLASSES IN ONE POLICY.

Life insurance policy containing all the standard provisions required for such insurance, and also containing a provision for the payment of double the regular amount of the policy if death results from accident while the insured is traveling as a passenger on a public conveyance, is contrary to the provisions of St. 1907, c. 576, § 34, that contracts for different classes of insurance shall be in separate and distinct policies, and also is in violation of St. 1910, c. 493, requiring certain standard provisions in accident policies. The provision in such a policy for the payment of an additional amount in case of death by accident constitutes accident insurance.

An insurance policy has been submitted for your approval which in general provides for life insurance and contains all the standard provisions required for such insurance, but also contains a further provision for payment of double the regular

To the
Insurance
Commissioner.
1915
December 11.

amount of the policy if death results from accident while the insured is traveling as a passenger on a public conveyance.

The question therefore arises whether such a policy is contrary to the provisions of St. 1907, c. 576, § 34 —

Contracts of insurance for each of the classes specified in section thirty-two shall be in separate and distinct policies notwithstanding any provision of this act which permits a company to transact more than one of said classes of insurance —

or falls within St. 1910, c. 493, requiring certain standard provisions in accident and health policies.

This latter act provides that “no policy of insurance against loss or damage from disease or by the bodily injury or death by accident of the assured shall be issued or delivered in this commonwealth” until certain conditions are complied with and unless certain provisions are therein contained.

It is earnestly argued that the policy in question is strictly a policy of life insurance, and it may well be admitted that such is the case. The question still remains, however, as to whether it is not also accident insurance and within the requirements of the statutes quoted above.

It is to be noticed that in denominating a certain policy as life insurance one may proceed upon a different basis of classification from that adopted in section 32 of the insurance law (St. 1907, c. 576), since the classification made therein in general is determined by the nature of the hazard or mischance protected against, while in life insurance, as the term is frequently used, it is the interest of the assured, to wit, his life, which furnishes the class. Naturally, under such circumstances the terms used may overlap, yet in most instances it will be clear that one line predominates and the other is but an incident.

As said by the court in *Metropolitan Life Insurance Co. v. Insurance Commissioner*, 208 Mass. 386, 389: —

An ordinary life insurance policy includes the occurrence of death by accident as one of the conditions which call for a payment by the company, as well as death from any other cause, and ordinary accident policies

include injuries by accident causing death, and to that extent they provide insurance of life. Yet neither of these two classes of policies is, for that reason, brought within the other class also.

If we assume the simple case of a policy covering death by accident and nothing more, it may well be said in a certain sense to be a contract of life insurance (see *Logan v. Fidelity and Casualty Co.*, 146 Mo. 114), but it is just as certain, under the terms of our statute, a contract of accident insurance.

The classification found in section 32 does not include life insurance, and nowhere in the statute is there to be found a categorical definition of that term. Section 66 defines what is to be treated as a life insurance company, but includes companies issuing contracts which cannot be regarded as life insurance, such, for example, as pure endowments and annuities. So far as the section relates to insurance the pertinent description is of a company doing business which involves "the payment of money . . . *conditioned* upon the continuance or cessation of human life." In other words, in this definition the hazard or contingency insured against is loss of life. In the accident policy it is the accident which furnishes the hazard, while the disability, loss of limb or loss of life following thereafter furnishes, not the condition upon which payment is to be made, but determines the amount of damage or loss which has been suffered, and is to be compensated for by reason of the happening of the condition insured against, to wit, the accident. It would seem, therefore, that in the simple case suggested, of a policy merely covering death by accident, it should be treated primarily as an accident policy within the provisions of the statutes mentioned.

St. 1907, c. 576, § 32, cl. 5, permits companies to be organized "to insure any person against bodily injury or death by accident." In my opinion the simple form of policy supposed exactly comes within the language just quoted. It would seem to follow, applying the words of section 34, that contracts for such insurance (being one of the classes specified in section 32) must "be in separate and distinct policies."

Similarly, such a policy seems included in the terms of St. 1910, c. 493, § 1, which, leaving out phrases not pertinent, would read: "No policy of insurance against loss or damage . . . by . . . death by accident of the assured shall be issued" unless the conditions therein set forth are complied with. Stated in this short form the simple case of a policy covering death by accident is exactly what is described by the statute.

While the policy now under consideration does not in terms provide in one clause for \$1,000 straight life insurance and in another clause for a further insurance of \$1,000 for death by accident, neither the limitation upon the kind of accident insured against nor the fact that the amount is expressed as a double payment in case death occurs in the manner specified seems to me to change the situation. The effect in either case is the same.

The reasoning of the opinion in the case of *Metropolitan Life Insurance Co. v. Insurance Commissioner*, *supra*, appears to support this conclusion. While the decision in that case was to the effect that the policy then under consideration (which provided for only a fractional amount of the face value if death occurred within certain limited periods, but for the full amount if such death were by accident) did not involve any element of accident insurance, it was based upon a careful analysis of the policy and a conclusion that the effect was "as if the limitation upon payments for deaths occurring within six months were expressed as applying to such deaths occurring from causes other than accidents." "It is not the giving of direct affirmative benefits of a special kind on account of the accident."

The present policy is precisely what the policy in that case was thus stated not to be.

In the able and exhaustive argument in behalf of the insurance company it is pointed out that some of the provisions required by the 1910 act to be inserted in accident policies are most inapt as applied to the policy in question. This, however, would seem rather to demonstrate the wisdom of the requirement of section 34, that policies of different classes shall

be separate and distinct, than to lead to a conclusion that the feature of double indemnity is not in its essence accident insurance as to the extra payment offered in case death results from accident in the manner specified.

In my opinion you are justified in refusing to approve the form of policy submitted, both by the provisions of St. 1907, c. 576, § 34, and St. 1910, c. 493.

INTEREST ON TAXES.

Under Gen. St. 1915, c. 237, § 21, interest may be collected at the rate of 6 per cent. on all taxes unpaid after November 1, where no action has been taken upon the subject by the town.

I beg to acknowledge your request for my opinion as to whether, under the provisions of section 21 of chapter 237 of the General Acts of 1915, interest may be charged upon taxes in cases where no action has been taken upon the subject by the town.

To the Tax
Commissioner.
1916
January 3.

Prior to 1913 the liability of taxpayers to pay interest upon taxes assessed upon them seems to have been conditioned upon a vote of the city, town or district to that effect. St. 1909, c. 490, Part I., § 71. By St. 1913, c. 688, § 1, the section just referred to was amended by substituting the following provision therefor: —

Taxes shall be payable in every city and town and in every fire, water, watch or improvement district in which the same are assessed, not later than the fifteenth day of October of each year, and on all taxes so assessed remaining unpaid after the first day of November interest shall be paid at the rate of six per cent per annum from the fifteenth day of October until such taxes are paid; but a city, town, fire, water, watch or improvement district may by vote, ordinance or by-law charge interest from an earlier date, and such interest shall be added to and be a part of the taxes.

It is plain that this section expressly provides that interest shall be paid at the rate of 6 per cent. per annum from October 15 upon all taxes remaining unpaid after November 1. By

Gen. St. 1915, c. 237, § 21, the provision just quoted was amended so as to provide "on all taxes so assessed remaining unpaid after the first day of November interest shall be paid, at a specified rate of not less than six nor more than ten per cent per annum as such city by its city council or such town or district may vote." In my opinion the only purpose of this amendment was to authorize cities and towns, by express vote, to increase the interest rate from 6 per cent. to any higher rate not in excess of 10 per cent., and in the event that no such action is taken, interest shall be paid at the rate of 6 per cent.

My answer to your question is, therefore, that the town to which you refer may collect interest at the rate of 6 per cent. on all taxes unpaid after November 1.

RESERVOIRS — RIGHT TO TAKE WATER FROM.

In the absence of special circumstances no person has a right to take for his own use water from a reservoir under the charge of the Metropolitan Water and Sewerage Board, without its consent.

To the Metro-
politan Water
and Sewerage
Board.

1916
January 13.

I beg to acknowledge your request for my opinion as to whether individual inhabitants of any city or town within the watershed of any water supply used by your Board are entitled as a matter of right to take water from the reservoirs under your charge for their individual use, under the provisions of sections 25 and 26 of chapter 488 of the Acts of 1895. Those sections are as follows:—

SECTION 25. No person shall take or divert any water of a water supply of any city or town in said water district from any water source, reservoir, conduit or pipe used for supplying such water to, or in any such city or town, or occupy, injure or interfere with any such water, or with any land, building, aqueduct, pipe, drain, conduit, hydrant, machinery or other work or property so used, and no person shall corrupt, render impure, waste or improperly use, any such water.

SECTION 26. The provisions of the preceding section shall not apply to any person in taking or diverting any such water or interfering with or occupying any water, land or works therein described, by permission

of said metropolitan water board, or the water board, water commissioners or superintendent of any city or town having charge of the land, water or work; nor to the individual inhabitants of any city or town within the watershed of any water supply used by said metropolitan water board, or by any city or town aforesaid, in taking from the part of the supply or from the tributaries of the supply within their respective city or town limits so much of the water thereof as they shall need for their ordinary domestic household purposes, for extinguishing fires, or for generating steam.

It will be noted that neither of these sections purports to grant to any one any affirmative legal rights. Section 25 expressly forbids the diverting of any water from any water source, reservoir or pipe. Section 26 is merely a limitation upon the prohibition contained in the previous section. That prohibition does not apply to persons coming within the classes mentioned in section 26. Those persons, however, are not granted any affirmative rights. They are merely permitted to exercise any rights that they already have or thereafter acquire. Thus riparian owners along any stream which is a part of a water supply may continue to exercise their rights to take water from the stream as riparian proprietors to the extent mentioned in section 26. Any other persons who have similar rights to take water from a stream may continue to do so.

As I understand it the reservoirs in charge of your Board are largely or wholly artificial bodies of water, and all the land immediately bordering upon them is owned by the Commonwealth and controlled by your Board. Under such circumstances, in my opinion no persons have any rights as riparian proprietors in these reservoirs, and, therefore, no persons have any legal rights to take water from such reservoirs which are reserved by section 26. It follows that in such cases no one may take water from such a reservoir except by the permission of your Board.

Isolated cases may arise where, by reason of special circumstances, a person owning land near or bordering upon a reservoir may have special rights in it or in streams or bodies of water which were flooded when it was constructed.

PROPERTY — CARCASS OF DEER.

The carcass of a deer killed under the provisions of St. 1913, c. 529, § 1, as amended by St. 1914, c. 453, by a farmer or other person upon land owned by him, becomes the property of the person so killing, although it cannot be sold by him.

To the Com-
missioners on
Fisheries
and Game.
1916
January 14.

You have requested my opinion as to whether the carcass of a deer killed by a farmer or other person upon land owned by him, in accordance with the provisions of St. 1910, c. 545, as amended by St. 1912, c. 388, St. 1913, c. 529, and St. 1914, c. 453, is the property of the farmer killing the deer or the property of the Commonwealth.

The first two statutes named are repealed by St. 1913, c. 529, and are therefore immaterial except as preceding legislation is helpful in the interpretation of that now in effect.

The statute now applicable is St. 1913, c. 529, § 1, as amended by St. 1914, c. 453. It provides as follows:—

It shall be unlawful, except as hereinafter provided, to hunt, pursue, wound or kill a deer, or to sell or offer for sale, or to have in possession for the purpose of sale, a deer or the flesh of a deer captured or killed in this commonwealth: *provided*, that this act shall not apply to a tame deer belonging to any person and kept on his own premises; and *provided, further*, that any farmer or other person may, on land owned or occupied by him, or, with the consent of the owner, upon land adjacent thereto pursue, wound or kill any deer which he has reasonable cause to believe has damaged or is about to damage crops, fruit or ornamental trees, except grass growing on uncultivated land; and he may authorize any member of his family, or any person employed by him so to pursue, wound or kill a deer under the circumstances above specified. In the event of the wounding or killing of a deer as aforesaid, it shall be the duty of the person by whom or under whose direction the deer was wounded or killed to mail or otherwise transmit within twenty-four hours thereafter to the commissioners on fisheries and game a report in writing signed by him of the facts relative to the said wounding or killing. The said report shall state the time and place of the wounding or killing, and the kind of tree or crop injured or destroyed, or about to be injured or destroyed, by the deer. It shall be unlawful to sell or offer for sale the whole or any part of a deer killed under the aforesaid provision.

Apart from statutory provisions, deer and game become the property of the person taking them or reducing them to posses-

sion, and but for the statute in question there could be no doubt that the farmer killing the deer would acquire title to the carcass.

In my opinion there is nothing in the statutes mentioned which changes the law in this respect. The section quoted makes it unlawful to hunt, kill or sell deer "except as hereinafter provided." One of these provisos is that a farmer, under certain conditions, may kill a deer. There is nothing in the act which provides for a different result following such killing as is permitted from that prescribed by the law before the enactment of the statute in question. The final sentence, which provides that "it shall be unlawful to sell or offer for sale the whole or any part of a deer killed under the aforesaid provision," seems to imply that the farmer acquires title but is forbidden to dispose of the meat. If title vested in the Commonwealth, inasmuch as the meat cannot be sold it would seem that it must be wasted, and it would require a definite statutory enactment to bring about such a result.

Accordingly, I am of the opinion that under the proviso in said section the carcass of such a deer is the property of the farmer or other person authorized to kill.

SALARIES — UNEARNED CANNOT BE PAID FROM PUBLIC FUNDS.

The payment of a salary by the Massachusetts Agricultural College to the estate of a deceased employee for the period after his death would be an unauthorized expenditure of public funds contrary to R. L., c. 6, § 58.

I am in receipt of your letter stating that one of the employees of your institution died on Dec. 1, 1915, and requesting my opinion as to the propriety of paying to his estate the amount of his salary for the entire month of December.

Of course, if the payment proposed to be made was of money belonging to the Massachusetts Agricultural College as a corporation distinct from the State, there could be no legal objection to this action, but, by St. 1911, c. 311, all property, real or personal, belonging to the Massachusetts Agricultural College,

To the
Massachusetts
Agricultural
College.
1916
January 20.

not held by it upon special trusts, vested in the Commonwealth, so that moneys derived from other sources, as well as direct appropriations by the Legislature, are now held by your institution as trustee for the public. The real question, then, is whether public moneys can be expended for this purpose.

There is an implied condition in every contract for personal services that the employee will be able to perform such services, and in case of his death during the contract of employment the employer's liability to pay further compensation or salary is terminated. *Johnson v. Walker*, 155 Mass. 253. If such payment is made it would be in the nature of a gratuity.

R. L., c. 6, § 58, dealing with salaries payable from the treasury of the Commonwealth, provides, in part, as follows:—

. . . No salary shall be paid to any person for a longer period than that during which he has been actually employed in the duties of his office. . . .

This provision was considered by the court in *Lord v. County of Essex*, 98 Mass. 484, where it says:—

It is true that this, like all other statute provisions, may be repealed by the Legislature at any time or in any respect, and that it is not in terms extended to salaries payable out of the county treasury. But it tends to indicate a general policy in such matters; and an intention on the part of the Legislature to depart from so prudent and so just a rule is not to be inferred unless clearly expressed, nor to be more readily presumed when the payment is to be made out of the treasury of a county, than when it is to come directly out of the treasury of the Commonwealth.

For the above reasons I feel compelled to advise that, in my opinion, such a payment as you propose would be an unauthorized expenditure of public funds.

BOSTON FINANCE COMMISSION — AUTHORITY.

Under St. 1909, c. 486, § 18, the Boston Finance Commission may investigate expenditures, accounts, etc., of the office of clerk of the Superior Court for Civil Business in Suffolk County.

I beg to acknowledge your request for my opinion as to whether the Boston Finance Commission has the right to investigate any and all matters pertaining to the finances of the office of the clerk of the Superior Court for Civil Business in the County of Suffolk.

To the
Boston Finance
Commission.
1916
January 28.

St. 1909, c. 486, § 18, provides as follows: —

It shall be the duty of the finance commission from time to time to investigate any and all matters relating to appropriations, loans, expenditures, accounts, and methods of administration affecting the city of Boston or the county of Suffolk, or any department thereof, that may appear to the commission to require investigation, and to report thereon from time to time to the mayor, the city council, the governor, or the general court. The commission shall make an annual report in January of each year to the general court.

It seems to me that this section not only authorizes you but makes it your duty to investigate the expenditures, accounts and methods of administration of the office of the clerk of the Superior Court for Civil Business in the County of Suffolk to the extent that it may appear to your commission that such investigation is required.

HAWKERS AND PEDLERS — SELLING OF TAGS FOR CHARITABLE PURPOSES.

The raising of money for charitable purposes by "selling" tags is not a sale of goods, wares and merchandise within the meaning of R. L., c. 65, §§ 13-29, relating to hawkers and pedlers.

You recently requested my opinion as to whether the soliciting of money for charitable or similar purposes by the "selling" of tags is a violation of the provisions of sections 13 to 29 of

To the Com-
missioner of
Weights and
Measures.
1916
February 9.

chapter 65 of the Revised Laws, dealing with hawkers and peddlers.

In my opinion this method of raising funds is not a sale of goods, wares or merchandise within the meaning of section 13 of the chapter to which you refer. Transactions of this sort are not, in legal effect, sales of these tags. They are rather the soliciting of contributions, and the tags are a form of receipt or acknowledgment given to the contributor.

CONSTITUTIONAL LAW — EMINENT DOMAIN — SALISBURY BEACH.

The power of eminent domain can be exercised only for a public purpose and therefore Senate Document No. 184, entitled "An Act to make Salisbury Beach a public reservation," would be unconstitutional if enacted, since section 10 of this act authorizes the leasing or sale of parts of the land so taken "which are not needed as a public reservation."

To the Senate,
1916
February 18.

I acknowledge receipt of a copy of an order passed by the Honorable Senate on Feb. 9, 1916, which is as follows: —

Ordered, That the opinion of the Attorney-General be requested by the Senate upon the constitutionality, if enacted, of the bill, known as Senate Document No. 184, entitled "An Act to make Salisbury Beach a public reservation and to establish the Salisbury Beach Reservation Commission," now under consideration by a committee of the General Court, and that a copy of said bill be transmitted to the Attorney-General by the clerk of the Senate.

Upon examination, the proposed bill accompanying this order appears to be identical with chapter 715 of the Acts of 1912. On June 19, 1913, that statute was held to be unconstitutional by the Supreme Judicial Court, on the ground that it was an attempt to authorize the exercise of the right of eminent domain in part for a private use. *Salisbury Land & Improvement Co. v. Commonwealth*, 215 Mass. 371. This decision has not been overruled and, so far as I am aware, has never been questioned by the court.

An amendment to the Constitution was adopted by the peo-

ple at the election in November, 1915, and is now in force in the following form: —

The general court shall have power to authorize the commonwealth to take land and to hold, improve, sub-divide, build upon and sell the same, for the purpose of relieving congestion of population and providing homes for citizens; *provided, however*, that this amendment shall not be deemed to authorize the sale of such land or buildings at less than the cost thereof.

No other change in the Constitution since the decision of the Supreme Judicial Court has been called to my attention which can, by any possibility, have any bearing upon the question submitted by the order of the Senate.

The article of amendment just referred to empowers the General Court to authorize the exercise of the right of eminent domain only "for the purpose of relieving congestion of population and providing homes for citizens." The bill submitted with the order appears to have no such purpose. It is entitled, "An Act to make Salisbury Beach a public reservation and to establish the Salisbury Beach Reservation Commission." Section 4 authorizes the commission created by the bill to acquire, by right of eminent domain, "and thereafter to maintain and make available for the inhabitants of the commonwealth as a public reservation for the use, exercise and recreation of the inhabitants of the commonwealth" certain land particularly described. The proposed bill, therefore, so far as its purpose is a public one, is a bill for the creation of a public reservation or park. No part of its avowed purpose is the relieving of congested population or the providing of homes for citizens. By section 10 the commission is authorized to sell or lease lands taken by it "which are not needed as a public reservation;" but there is no requirement that such sales or leases shall be made to effectuate the purpose stated in this amendment to the Constitution or any other specific purpose.

No conditions have been called to my attention in any of the cities and towns specified in the third section of the proposed bill calling for legislation under this amendment. It is obvious

that if such conditions exist it can only be in one or more of the cities mentioned, and not in the various small towns included in the so-called Salisbury Beach Reservation district. I am unable to find any connection between the provisions of the bill and the relief of congestion of population.

In my opinion, the proposed bill does not come within the power granted to the General Court by this amendment to the Constitution, and, therefore, if enacted, would be unconstitutional upon the grounds stated by the Supreme Judicial Court in declaring unconstitutional the same bill enacted in 1912.

“GAME LAWS”—REVOCATION OF LICENSE FOR VIOLATION —
SALE OF GAME.

R. L., c. 92, § 14, is a “game law” within the meaning of St. 1911, c. 614, as amended, providing for the revocation of the hunting license of a person violating its provisions.

Numbered tags furnished by the Commissioners on Fisheries and Game must be placed upon the bodies of Scotch grouse, European black game and European black plover before they can be sold by dealers under the provisions of St. 1912, c. 567.

To the Com-
missioners on
Fisheries and
Game,
1916
February 21.

I am in receipt of your letters requesting my opinion upon the following questions:—

1. Whether a violation of R. L., c. 92, § 14, operates as a forfeiture of the hunting license or certificate of the person so offending.
2. Whether certain tags must be placed upon the bodies of Scotch grouse, European black game and European black plover before they can be sold by dealers under the provisions of St. 1912, c. 567.

R. L., c. 92, § 14, provides as follows:—

Whoever, for the purpose of shooting or trapping, enters upon land without permission of the owner thereof, after such owner has conspicuously posted thereon notice that shooting or trapping thereon is prohibited, shall be punished by a fine of not more than twenty dollars.

St. 1911, c. 614, as amended by St. 1912, c. 379, St. 1913, c. 249 and c. 479, and Gen. St. 1915, c. 212, provides, in part, as follows:—

The certificate of any person who shall be convicted of a violation of the *game laws* or of any provision of this act shall be void. . . .

The answer to your first question thus depends upon whether R. L., c. 92, § 14, is to be considered a *game law*. This chapter of the Revised Laws is entitled "Of the preservation of certain birds and animals." The purpose of the section in question is the protection of game even though the protection is only partial, *i.e.*, against trespassers, and I am of the opinion that it comes within the purview of the last-quoted statute.

The answer to this question, therefore, must be in the affirmative.

St. 1912, c. 567, § 1, prohibits in general terms the dealing in or sale of game. Section 3 authorizes your commission to license the rearing for sale and killing of certain game and birds, and section 5 authorizes the sale by dealers of certain imported birds, but in each of these sections there is a positive provision that certain numbered tags shall be fixed to each body or carcass so sold.

It seems to me that this provision is mandatory, and your second question must also be answered in the affirmative.

CONSTITUTIONAL LAW — POLICE POWER — REGULATION OF SALE OF THEATRE TICKETS.

A bill seeking to regulate the prices at which and the places where theatre tickets may be sold is not a valid exercise of the police power, and therefore would be unconstitutional if enacted.

A bill providing that no theatre tickets shall be sold unless a seat is available at the time of the sale would be a constitutional exercise of the police power as protecting the public against fraud.

I am in receipt of your letter in which you request my opinion upon the constitutionality of House Bills Nos. 951, 952 and 953. The first two bills seek to regulate the prices of tickets to theatres and other places of amusement and to limit the places at which such tickets may be sold. All

To the
Committee on
Mercantile
Affairs.
1916
February 25.

these bills involve the same questions of law and will be considered together.

Similar questions have frequently come before the courts, and the following decisions have almost uniformly been reached:—

First.—That a theatre is not a public enterprise but is a private business, and consequently not governed by the same rules which relate to common carriers and other public institutions of a like character. 38 Cyc. 264; *People v. Flinn*, 189 N. Y. 180; *Collister v. Hayman*, 183 N. Y. 253; *People v. Steele*, 231 Ill. 340; *People v. Powers*, 231 Ill. 560.

Second.—That such a business is subject to regulation by the State only in the exercise of its police power for the protection of the public health, safety, morals or general welfare.

Third.—That the regulation here attempted is not a valid exercise of the police power.

In the case of *Ex parte Quarg*, 149 Cal. 79, a statute of California made it a misdemeanor for any person to sell or offer for sale “any ticket or tickets to any theatre or other place of amusement at a price in excess of that charged originally by the management of such theatre or public place of amusement.” The court in holding this statute to be unconstitutional said:—

The police power is broad in its scope, but it is subject to the just limitation that it extends only to such measures as are reasonable in their application and which tend in some appreciable degree to promote, protect, or preserve the public health, morals, or safety, or the general welfare. The prohibition of an act which the court can clearly see has no tendency to affect, injure, or endanger the public in any of these particulars, and which is entirely innocent in character, is an act beyond the pale of this limitation, and it is therefore not a legitimate exercise of police power. The sale of a theatre ticket at an advance upon the original purchase price, or the business of reselling such tickets at a profit, is no more immoral, or injurious to public welfare or convenience, than is the sale of any ordinary article of merchandise at a profit.

See also *People v. Steele*, 231 Ill. 340; III. Op. Atty.-Gen., 491, 492.

For the above reasons, it would seem clear that these bills, if enacted, would be unconstitutional.

In House Bill No. 953, which provides that it shall be unlawful to sell tickets of admission to theatres, concert halls or other places of amusement purporting to entitle the holder to a seat, unless a seat is available at the time of the sale and at the time of the entrance of the purchaser into the theatre, a different question of law is involved.

The protection of the public against fraud is a well-recognized branch of the police power, in the exercise of which the State may abridge an individual's freedom to contract, even in private business. Instances of this are the laws regulating the sale of oleomargarine and merchandise in bulk and the laws relating to weights, measures and packages. As was said by the court in *Plumley v. Massachusetts*, 155 U. S. 461, "The Constitution does not secure to any one the privilege of defrauding the public." See also *John P. Squire & Co. v. Tellier*, 185 Mass. 18, in which the constitutionality of St. 1903, c. 415, regulating the sale of goods in bulk, was upheld upon this ground.

I am of the opinion, therefore, that House Bill No. 953, if enacted, would be constitutional.

CONSTITUTIONAL LAW — POLICE POWER — DEDUCTIONS FROM EMPLOYEE'S PAY.

House Bill No. 1713, providing that no employer shall deduct from an employee's pay more than the amount of wages in actual time lost on account of the employee's coming late to work, is a valid exercise of the police power and would be constitutional if enacted.

I acknowledge receipt of an order passed by the House of Representatives on Feb. 18, 1916, in the following form:—

To the House
of Repre-
sentatives.
1916
March 6.

Ordered, That the Attorney-General be requested to render an opinion to the House of Representatives as to the constitutionality of House Bill No. 1713, entitled "An Act relative to deductions from the pay of employees who are late in coming to work."

The bill referred to in this order is entitled "An Act relative to deductions from the pay of employees who are late in coming to work." It provides as follows:—

SECTION 1. No employer shall deduct from an employee's pay more than the amount of wages in actual time lost on account of the employee's coming late to work.

SECTION 2. Whoever violates the provisions of this act shall be punished by a fine of not more than fifty dollars.

A difficulty of construction lies at the outset of the question propounded by the order. Literally construed, it appears that deductions for all causes are prohibited, as well as those on account of the coming late to work by the employee, as the phrase "on account of the employee's coming late to work" does not refer to the *reason* for deductions but to the *amount* which may be deducted in any event.

Again, it is open to the interpretation that it is not limited to employees receiving wages, but applies to all employees, however paid. If so construed, the bill, in my judgment, would be unconstitutional.

I think, however, it is intended by the bill to forbid employers deducting from the wages of an employee on account of his coming late to work more than an amount proportionate to the actual time the employee was late, on account of the damages claimed to be suffered by the employer by reason of the employee's tardiness. Adopting that construction, I proceed to consider the bill.

The "right of acquiring, possessing and protecting property" and the right to the enjoyment of "life, liberty and property" are secured to every citizen by the Constitution of Massachusetts, as well as by the Constitution of the United States. These rights include the right to use one's powers and faculties in any reasonable way for the promotion of his interests and the right to make contracts with others, and can be regulated by the Legislature in the exercise of the police power only in the interest of the public health, the public safety or the public morals, and, in a certain restricted sense, the public welfare.

The question presented, then, is whether this bill, if enacted, would be a reasonable exercise of this power in the interests of the public welfare. This matter is one in the first instance for the Legislature to determine, and its determination will not be revised by the court unless it is clearly unwarranted.

That the public welfare is involved in the manner and time in which certain employees are paid, is evidenced by our weekly payment law, the constitutionality of which was upheld upon this ground by the Supreme Judicial Court in *Opinion of the Justices*, 163 Mass. 589, and our laws relating to the assignment of wages. *Commonwealth v. Martel*, 200 Mass. 482.

The proposed act will deprive the employer of no right which he now has to discharge the employee. The act does not purport to preclude the employer from recovering in an action against the employee damages which he has sustained, if any, on account of the employee's tardiness, in addition to the amount which he is authorized to deduct from the employee. Nor, in my judgment, does it necessarily follow that, if the act should be construed to prohibit such an action, it would be unconstitutional. The contractual relations of substantially all whom it affects are at will, that is, terminable at the pleasure of either party. Thus, it is difficult to conceive of any claim for substantial damages for tardiness that an employer would ever have against any employee to whom the act applies, in addition to the deduction which the act permits him to make from such employee's wages. A contention, therefore, that the act requires an employer to pay for that which he has not received seems to me fanciful rather than substantial.

I am not unmindful of the case of *Commonwealth v. Perry*, 155 Mass. 117, in which our Supreme Judicial Court held unconstitutional a statute providing as follows:—

No employer shall impose a fine upon or withhold the wages or any part of the wages of an employee engaged at weaving for imperfections that may arise during the process of weaving.

That statute was interpreted by the court as requiring payment in full of a price agreed upon for good work when only

imperfect work had been done. This bill merely provides that if the employer does not elect to discharge his employee and permits him to work when he comes late, he shall be permitted to deduct from the employee's wages only an amount proportional to the actual time that he is late. He is permitted to deduct a pro rata amount, and thus he pays only a partial wage for partial time. He is forbidden to deduct any amount on account of more remote damages; in other words, he is permitted to deduct a pro rata amount on the ground that in most cases that will constitute the full amount of his damages, and, in the exceptional cases, where more remote damages are suffered, he is left to his action at law. In my opinion, this is a very different situation from that before the court in the case cited.

Furthermore, in my judgment, it cannot be said that this bill is too broad in its application, and that it is thus an unreasonable interference under the police power with the right of contract. As I construe it, the bill is limited in its scope to a class of employees which can fairly be said to need its protection. It does not apply to all employees, but only to those who earn wages. Though the line between wages and salary is not a clearly defined one, in the main the term "wages" is used to describe compensation paid, usually at a daily or weekly rate, for the performance of labor, skilled or otherwise. To use a phrase frequently appearing in our statutes, wages is the compensation paid to "laborers, workmen or mechanics." In my view this bill applies only to laborers, workmen and mechanics, and perhaps to a few other employees who earn wages and yet do not come strictly within that description, and not to all persons standing in the relation of employer and employee. Thus construed, the classification adopted by it seems to me to be a reasonable one.

I assume the purpose of the act is to prohibit an employer from arbitrarily deducting an amount determined by himself from the wages of an employee, and to prevent the practice of fraud and oppression upon a class of persons not in a favorable position to protect themselves.

I am unable to say that no just ground exists for such legislative interference, if properly limited, and, accordingly, if the General Court enacts the bill, I am of the opinion that it will be constitutional. If it is deemed expedient to enact the bill, I suggest it be amended to eliminate ambiguity. Without amendment, it might be construed otherwise than I have construed it, and, in that event, much more difficult questions as to its constitutionality would arise.

TIDEWATERS — AUTHORITY OF HARBOR AND LAND COMMISSIONERS TO GRANT LICENSES TO BUILD STRUCTURES.

The authority of the Board of Harbor and Land Commissioners to license, with the approval of the Governor and Council, under R. L., c. 96, § 17, the building of structures in tidewater is not strictly limited by § 22, but the last-mentioned section indicates only the legislative policy in regard to such licenses and the legislative intent as a guide to the courts in construing such licenses.

You request my opinion upon the legality of a license granted by the Board of Harbor and Land Commissioners to the Rockport Granite Company. I assume that your inquiry is as to how far the authority of the Board of Harbor and Land Commissioners to grant licenses for the erection of structures in tidewater below high-water mark, under the provisions of section 17 of chapter 96 of the Revised Laws, is limited by the provisions of section 22 of said chapter.

The title to all land below low-water mark is in the Commonwealth unless the same has been alienated by it. From immemorial practice, licenses for the erection of structures both above and below low-water mark have been granted by the Legislature, or by some body delegated by it to grant such licenses, and I assume that there is now no question as to the authority under the Constitution to make such grants.

That the upland owner has no rights in tidewater of which the public cannot deprive him in the accomplishment of a public purpose seems to be clear. *Commonwealth v. Breed*, 4 Pick.

To the
Governor
and Council.
1916
March 14.

460; *Blood v. Nashua & Lowell R.R. Co.*, 2 Gray, 137; *Home for Aged Women v. Commonwealth*, 202 Mass. 422.

It would also seem that the right of access of an upland owner to channels and to the sea may be cut off even by individuals engaged in private enterprises under a license by the Legislature. *Nichols v. Boston*, 98 Mass. 39; *Attorney-General v. Revere Copper Co.*, 152 Mass. 444; *Commonwealth v. Boston Terminal Co.*, 185 Mass. 281.

It appears, therefore, that the exercise of the power conferred upon the Board of Harbor and Land Commissioners by section 17 of chapter 96 of the Revised Laws to grant licenses, with the approval of the Governor and Council, for the erection of structures in tidewaters where no established harbor line intervenes is subject to no other limitations than those specified in said chapter 96.

It is to be noted in this regard that under section 24 of said chapter it is provided that the amount of compensation to be paid to the Commonwealth for the rights granted in any land, the title to which is in the Commonwealth, shall be determined by the Governor and Council. This contemplates, in my judgment, the payment of such compensation by the licensee as shall be determined to be just and equitable by the Governor and Council. I doubt, therefore, the legality of following the suggestion made by the Board of Harbor and Land Commissioners that no charge shall be made for the rights and privileges granted by the license.

Objection is raised that the Board of Harbor and Land Commissioners exceeded their authority in issuing the license. It is urged that section 22 of chapter 96 of the Revised Laws restricts their power to issuing licenses for structures that will not "interfere with or impair the right of any person affected thereby to equal proportional privileges of approaching low-water mark or one hundred rods from high-water mark, or harbor lines established by law, or to impair the right to obtain a license or authority so to approach of persons having interests in lands or flats which may be affected thereby."

I am of the opinion that this is not a fair construction of said section 22, and am fortified in that opinion by the fact that the statute was originally passed in 1869 (St. 1869, c. 432), at a time when there was no authority to build structures upon or to fill up or enclose flats except by a license from the General Court. The provisions of the statute as originally passed were as follows:—

All license or other authority that has heretofore been granted, or that may hereafter be granted, to build structures upon, or to fill up or inclose any such ground, shall be, as far as reasonably and justly may be practicable, so construed as not to interfere with or impair the right of any person affected thereby to equal proportional privileges of advancing to or towards low-water mark, or one hundred rods from high-water mark, or harbor lines established by law, or so as to impair the opportunity of persons having interests in lands or flats that may be affected thereby to obtain license or authority so to advance. Nothing in such license or authority shall be so construed as to impair the legal rights of any person.

Prior to the passage of the statute of 1869 it was provided by section 4 of chapter 149 of the Acts of 1866 that—

All persons that have been or may be authorized by the legislature to build over tide-waters any bridge, wharf, pier or dam, or to fill any flats, or to drive any piles below high-water mark, who have not already begun such work, shall, before beginning it, give written notice to the harbor commissioners of the work they intend to do, and submit plans of any proposed wharf or other structure, and of the flats to be filled, and of the mode in which the work is to be performed; and no such work shall be commenced until the plan and mode of performing the same shall be approved in writing by a majority of the said harbor commissioners. And the said commissioners shall have power to alter the said plans at their discretion, and to prescribe the direction, limits and mode of building of the wharves and other structures, to any extent that does not diminish or control the legislative grant.

The effect of the statute of 1869, taken in connection with the provisions of law then existing, was in effect a direction to the Harbor Commissioners that in the approval and supervision of the work authorized by a license from the General Court they should, so far as was reasonably and justly practicable, construe

the legislative grant so as not to impair the rights of others, in so far as this could be done without diminishing or controlling the legislative grant. It also indicated the legislative intent as a guide to the courts in construing licenses granted.

In 1872 (St. 1872, c. 236, § 1) power was given to the Harbor Commissioners to license the filling of flats and the erection of structures in tidewaters within the line of riparian ownership and within whatever harbor lines might be established.

In 1874 (St. 1874, c. 347) the Harbor Commissioners were given the power to license the filling of flats and the erection of structures below the line of riparian ownership, where no harbor line had been established, subject to the approval of the Governor and Council.

It was not until the passage of the Public Statutes, in 1882, that the provisions of law contained in chapter 432 of the Acts of 1869 referred in terms to licenses granted by the Board of Harbor and Land Commissioners.

I am of opinion, therefore, that the effect of section 22 of chapter 96 of the Revised Laws is the same as applied to a license granted by the Board of Harbor and Land Commissioners and approved by the Governor and Council as to a license or grant by the Legislature itself.

In so far as the statute applies to licenses granted by the Board of Harbor and Land Commissioners and approved by the Governor and Council, the terms for construction and extension being prescribed therein, it can have little, if any, effect except to indicate to the Board of Harbor and Land Commissioners and the Governor and Council the policy that in the judgment of the General Court the Harbor and Land Commissioners and the Governor and Council should follow in exercising the power of authorizing the filling of flats and the erection of structures in tidewaters, delegated to them by the General Court. Exceptional cases in the administration of the powers given to the Board of Harbor and Land Commissioners and the Governor and Council necessarily will arise where it is impracticable to preserve unimpaired the right of persons affected to equal proportional privileges of approaching low-

water mark or one hundred rods from high-water mark, and to what extent these privileges shall be impaired is left to the Board of Harbor and Land Commissioners and the Governor and Council to determine.

So far as the remonstrants to the approval of the license are concerned I am unable to see how their legal rights are impaired by the extension of the pier in the manner proposed. In no substantial way will it impair access to their upland beyond the impairment by the present pier.

A further objection is raised by the remonstrants that the proposed structure will affect the tidal currents in such a way as to cause a gradual filling of the cove and a shallowing of the water adjacent to their upland. Whether such a result would ensue is a question of fact which I am unable to determine, and is a matter, in my opinion, primarily for the Governor and Council to consider in determining the wisdom of approving the proposed structure. However, if the construction of the pier should have that result, I am of the opinion that the persons affected thereby would have no claim for damages. *Fitchburg R.R. v. Boston & Maine R.R.*, 3 Cush. 88.

Accordingly, I am of the opinion that, if the Governor and Council deem it expedient in the public interest to approve the license granted by the Board of Harbor and Land Commissioners, there is no legal objection to such approval.

CONSTITUTIONAL LAW — CORPORATIONS — REGULATION OF SALE OF THEATRE TICKETS.

There is no constitutional objection to a law amending the charter of domestic corporations organized since 1831, engaged in the theatre business, by stipulating in what manner theatre tickets shall be sold by them, nor to making it a condition to the doing of such business in this Commonwealth by foreign corporations that such corporations shall sell their tickets in the manner so stipulated.

I acknowledge receipt of your letter in which you request my opinion on the constitutionality of the enclosed redraft of House Bill No. 951, entitled "An Act to regulate the sale of tickets by theatres and other places of amusement."

To the
Committee on
Mercantile
Affairs,
1916
March 21.

The operation of this bill is confined to corporations, and the question therefore involves considerations different from those discussed in my opinion as to the constitutionality of the original bill.

It was early decided that the charter given to a corporation by the Legislature was a contract, within the meaning of the provision of the Federal Constitution which declares that no State shall pass any law impairing the obligation of a contract. *Dartmouth College v. Woodward*, 4 Wheat. 518. By St. 1831, c. 81, now R. L., c. 109, § 1, as affected by St. 1903, c. 437, § 2, it is provided that all acts of incorporation passed since the eleventh day of March, 1831, shall be subject to amendment, alteration or repeal by the General Court, and that all corporations which are organized under general laws shall be subject to such laws as may be hereafter passed affecting or altering their corporate rights and duties, or dissolving them.

Subject to the limitation that the power to amend "cannot be used to take away property already acquired under the operation of the charter, or to deprive the corporation of the fruits actually reduced to possession of contracts lawfully made" (Sinking-fund cases, 99 U. S. 700), any alteration or amendment may be made "that will not defeat or substantially impair the object of the grant, or any rights which have vested under it, and that the Legislature may deem necessary to secure either that object or other public or private rights." *Commissioners v. Holyoke Water Power Co.*, 104 Mass. 446, 451; *Greenwood v. Freight Co.*, 105 U. S. 13; *Spring Vale Water Works v. Schottler*, 110 U. S. 347.

A State has the absolute power to exclude foreign corporations from doing business within its borders, subject to the qualification that in so doing it may not interfere with foreign or interstate commerce or agencies employed by the Federal government. This absolute power of exclusion includes the right to allow a conditional exercise of its corporate powers within the State. *Pembina Mining Co. v. Pennsylvania*, 125 U. S. 181.

I am of the opinion, therefore, that if the application of sec-

tion 1 of the bill in question were limited to Massachusetts corporations incorporated since March 11, 1831, it would be constitutional.

There is a difficulty of construction in sections 1 and 3 of the proposed act. The language of these sections is: "that the sale of tickets of admission to such theatre or other places of amusement at any place at a price in excess of that charged originally by the management of such theatre or other place of amusement . . . is prohibited." The first part of section 1 purports to be only an amendment to charters of certain corporations, while the language above quoted would seem to prohibit a sale of such tickets by any one at an advanced price. I assume that the purpose of this bill is to prohibit these corporations from selling, either directly or through their agents, these tickets at advanced prices. If this is what is desired, I think the phraseology of the bill should be changed so as to make this intent clear. Furthermore, I doubt the power of the Legislature to impose a penalty upon a corporation for acts committed by those over whom it has no control.

The last sentence of section 3 provides for the punishment of foreign corporations "by fine or imprisonment." I know of no way to imprison a corporation.

INSANE ASYLUM — RIGHT TO OPERATE ON PATIENT WITHOUT CONSENT.

Before a lumbar puncture can be made on an insane patient in an insane asylum, the consent of the patient's guardian must be secured, if the patient is incapable at the time of giving an intelligent consent; if the patient is capable of consenting, his own consent is first necessary.

I beg to acknowledge receipt of your letter in which you request my opinion upon the right of physicians under your Board to make lumbar punctures upon patients in insane asylums without their consent.

To the
State Board
of Insanity.
1916
March 25.

Under date of Feb. 14, 1916, an opinion was rendered by

this department to the effect that lumbar punctures could not be made on patients without their consent when such punctures were made for purposes of experimentation and research and your present question is limited to cases where they are made for the benefit of the patient himself.

Although a lumbar puncture may not, strictly speaking, constitute a surgical operation, I am of the opinion that the legal principles governing the right to perform either would be the same. The authorities upon the question of liability of a physician performing a surgical operation without the patient's consent are few. The general rule, as stated in 1 Kinkead on Torts, § 375, is as follows: —

The patient must be the final arbiter as to whether he shall take his chances with the operation, or take his chances of living without it. Such is the natural right of the individual, which the law recognizes as a legal one. Consent, therefore, of an individual, must be either expressly or impliedly given before a surgeon may have the right to operate.

This rule, however, is subject to the qualification that —

If a person should be injured to the extent of rendering him unconscious, and his injuries were of such a nature as to require prompt surgical attention, a physician called to attend him would be justified in applying such medical or surgical treatment as might reasonably be necessary for the preservation of his life or limb, and consent on the part of the injured person would be implied. And again, if, in the course of an operation to which the patient consented, the physician should discover conditions not anticipated before the operation was commenced, and which, if not removed, would endanger the life or health of the patient, he would though no express consent was obtained or given, be justified in extending the operation to remove and overcome them. *Mohr v. Williams*, 95 Minn. 261.

In *Pratt v. Davis*, 37 Chicago Legal Notes 213, Aff. 224 Ill. 300, the question arose as to the right of a surgeon to operate upon the plaintiff, an insane woman, without her consent. The surgeon defended, on the ground that the plaintiff's husband had sent her to the defendant's sanatorium and had consented to the operation. After stating that the husband was to be considered the guardian of the plaintiff, the court said: —

But it is obvious that to make good this defense, after it has been admitted, or has otherwise appeared that no consent of the patient herself can be shown, the defendant must show two things affirmatively: first, that the patient was not mentally in a condition to be in control of her body; and secondly, that her husband consented to the operation. If the first of these propositions is not established by him, and it does not appear that the plaintiff was incompetent reasonably to give or withhold her consent, proof of the second, that the husband did consent, would be futile.

Accordingly, I am of the opinion that if the patient at the time of the proposed puncture is incapable of giving an intelligent consent, the consent of the patient's guardian must be first secured; on the other hand, if the patient is capable of consenting, his own consent is necessary. While the State undoubtedly has broad power over its insane wards, it is unnecessary to consider whether the Legislature could provide for compulsory lumbar punctures, as, in my judgment, no act relating to the treatment of the insane indicates an intent upon the part of the Legislature so to provide.

BOARDS OF HEALTH — REGULATION OF PRIVATE SANATORIA FOR CONSUMPTIVES.

While local boards of health may not control or regulate the manner of treatment of consumptive patients in private sanatoria, they may, under the provisions of R. L., c. 75, § 42, as amended by St. 1906, c. 365, order all the patients therein removed to such other hospital or place of reception as they provide.

You have requested my opinion as to the authority of local boards of health to control and regulate the manner of treatment of consumptive patients in private sanatoria or boarding houses, and to prohibit the operation of such institutions as are not approved by them.

A board of health may cause any person infected with a disease dangerous to the public health to be removed to such hospital or other place of reception as it has provided, except in cases where the removal would be dangerous to such person's health, in which case the house in which he remains is subject

To the State
Department
of Health.
1916
March 29.

to the rules and regulations of said board. R. L., c. 75, § 42, as amended by St. 1906, c. 365.

This section is a compilation of Pub. Sts., c. 80, §§ 40, 41 and 75, which was held in *Brown v. Murdock*, 140 Mass. 214, not to authorize an interference by the board of health with the possession or control of the house in which there is an infected person where he may be removed without danger to him.

I am of the opinion, therefore, assuming that consumption is a disease dangerous to the public health, that these boards may not under existing statutes regulate the manner of treatment of consumptives in private sanatoria or boarding houses where such patients may be removed safely, but that it would be within the power of local boards of health to prevent such places from operating by ordering all the patients therein removed to such other hospital or place of reception as it provides.

TAXES — MUNICIPAL CORPORATIONS.

Under Senate Bill No. 346, providing for the setting off of a part of the town of Blackstone and incorporating it as the town of Millville after the first day of April, taxes for the current year assessed to inhabitants of and upon property located within the area so set off are payable to the town of Blackstone.

To the
Governor.
1916
April 17.

You have asked my opinion as to whether, in the event the provisions of Senate Bill No. 346 become law, taxes for the current year assessed to the inhabitants of, and upon property located in, that part of the town of Blackstone set off as the town of Millville will be payable to the town of Millville or to the town of Blackstone.

Sections 14, 15 and 23 of Part I. of chapter 490 of the Acts of 1909, as amended by section 2 of chapter 198 of the Acts of 1914, provide that poll taxes shall be assessed upon each person liable thereto in the city or town of which he is an inhabitant on the first day of April in each year; that personal estate shall be assessed to the owner in the city or town of which he is an inhabitant on the first day of April, and that taxes on real

estate shall be assessed in the city or town in which the estate lies to the person who is the owner or in possession thereof on the first day of April.

While in practice the taxes are assessed later, in contemplation of law they are assessed on the first day of April in each year. On that day the liability of the taxpayer to pay taxes to the town in which he is then an inhabitant or in which he then owns property becomes fixed. *Harmon v. Inhabitants of New Marlborough*, 9 Cush. 525.

Accordingly, I am of the opinion that the taxes assessed as of the first day of April, 1916, in that part of the town of Blackstone which it is proposed by Senate Bill No. 346 to incorporate as the town of Millville, will be payable to the town of Blackstone, notwithstanding the provisions of said bill.

The provisions of said bill are defective in a further respect, in that by section 7 it is provided that the registrars of voters of the town of Millville shall, before the first meeting of the town of Millville, prepare a list of voters in the town of Millville qualified to vote at said meeting. It is obvious that until said meeting is held there can be no registrars of voters of the town of Millville.

INSURANCE — PURPOSES.

An insurance company may not be incorporated under the laws of this Commonwealth for the three following purposes: (1) To examine, pass upon and guarantee titles to real estate; (2) to guarantee principal and interest of notes secured by first mortgages on real estate; (3) to act as agent in the collection of principal and interest of mortgage notes.

You have requested my opinion upon the question of whether or not you have authority to issue a license to a corporation organized for the three following purposes: (1) To examine, pass upon and guarantee titles to real estate; (2) to guarantee principal and interest of notes secured by first mortgages on real estate; (3) to act as agent in the collection of principal and interest of mortgage notes.

To the
Insurance
Commissioner.
1916
April 25.

St. 1907, c. 576, § 32, provides, in part, as follows: —

Ten or more persons residents of this commonwealth may form an insurance company for any one of the following purposes:

Ninth, To carry on the business commonly known as credit insurance or guaranty, either by agreeing to purchase uncollectible debts, or otherwise to insure against loss or damage from the failure of persons indebted to the assured to meet their liabilities.

Tenth, To examine titles of real and personal property, furnish information relative thereto and insure owners and others interested therein against loss by reason of encumbrances and defective title.

The first purpose mentioned in your question comes within the tenth clause above quoted, but the second purpose is not limited to insurance against loss by reason of encumbrances and defective title, and would seem to constitute credit insurance, as defined in the ninth clause, rather than title insurance.

As I construe the provisions of this section, they do not authorize the incorporation of an insurance company to transact both these kinds of business. I am fortified in this construction by the provisions of section 34, which authorize the doing of more than one class of insurance in certain particular instances and do not include the proposed purposes.

Accordingly, the answer to your question must be in the negative.

MILITIA — APPOINTMENT OF ADJUTANTS.

An adjutant of the commanding officer of a battalion in a regiment of field artillery is not an adjutant of the commanding officer of a regiment within the meaning of article X. of section I. of chapter II. of the Constitution of Massachusetts, providing for the appointment of adjutants by commanding officers of the regiment.

You ask my opinion as to whether that part of article X. of section I. of chapter II. of the Constitution of Massachusetts which provides that "the commanding officers of regiments shall appoint their adjutants and quartermasters; the brigadiers their brigade-majors; and the major-generals their aids; and the governor shall appoint the adjutant-general," requires that the adjutants of the commanding officers of battalions in the

regiment of field artillery shall be appointed by the commander of the regiment.

An adjutant is a regimental staff officer appointed to assist the commanding officer of a regiment in the discharge of the details of his military duty. The title "adjutant" has been given to officers performing a similar duty to subordinate officers in regiments commanding subdivisions thereof. These officers, in my opinion, are not adjutants of the commanding officers of regiments, in the sense in which the words are used in the provision of the Constitution. The purpose of this provision would seem to be that, as the adjutant of the commanding officer is an assistant to him, upon whom he must rely for the performance of important details of his military duty, he should be free to select as such assistant a person in whom he has absolute confidence.

Whether a military officer is an adjutant to a commanding officer of a regiment, within the meaning of the Constitution, in my opinion, is to be determined by the duties he performs rather than by the name given to him by the provisions of statutes or by military regulations. As I understand it, these officers called adjutants, attached to the battalion staffs, perform details of the military duty of majors and are confidential assistants to such majors. Accordingly, I am of the opinion that they are not, at the time they are assistants to the majors, assisting them in the performance of their military duty, adjutants to the commanding officer of the regiment, within the meaning of the provisions of the Constitution.

ARMORIES — MUNICIPAL CORPORATIONS.

A dance or exhibition drill to be held by a military company in an armory of the first class which it occupies is not within the provisions of R. L., c. 102, § 173, prohibiting the carrying on of a public exhibition, show or amusement without a license from the mayor and aldermen of the city in which it is carried on.

I beg to acknowledge receipt of your communication requesting my opinion upon the question of whether or not it is necessary for the military companies which occupy armories

To the
Adjutant-
General.
1916
May 2.

to secure a license from the respective city authorities when these companies hold exhibition drills or dances in such armories and charge admission.

Armories of the first class, to which I assume your inquiry refers, are constructed upon land acquired by the Commonwealth through the Armory Commissioners, under the provisions of St. 1908, c. 604. By section 132 of this act the quartermaster-general is given full supervision and control of the care and maintenance of all armories belonging to the Commonwealth. In my opinion this includes not only the armory building itself but the land belonging to the Commonwealth upon which the armory is erected.

St. 1908, c. 604, as amended by St. 1914, c. 752, authorizes the use of armories not only for strictly military purposes, but also for such purposes incidental thereto as may be designated by the Commander-in-Chief and for public purposes.

The holding of exhibition drills or dances would seem to come within the authorized purposes, for the proceeds derived therefrom must be devoted to military purposes. Under the authority of St. 1908, c. 604, § 191, as amended by Gen. St. 1915, c. 289, § 7, General Orders No. 24 was issued by the Adjutant-General's office, which provided, in part, as follows:—

The funds of an organization, company or detachment shall consist of the gross amount of all monies received from all sources for or in behalf of such organization, company or detachment or the members thereof, and such funds shall be considered military funds and shall be administered in the manner prescribed by these regulations.

No expenditure shall be made other than for military purposes of the organization, company or detachment.

R. L., c. 102, § 173, provides that it shall be unlawful to carry on a public exhibition, show or amusement without a license from the mayor and aldermen of the city in which it is held, and the question here presented is whether this section applies to agencies of the State. It is to be presumed as a matter of law that the Legislature, in delegating this power to the mayor and aldermen of cities, had primarily in view the

regulation of the conduct of the citizen and not that of the State.

Former Attorney-General Knowlton, in discussing a similar question, said: —

The fountain of the police power of the Commonwealth is the Legislature acting under the authority of the Constitution. The Legislature has seen fit to delegate a portion of this police power to local boards of health. Although this delegation is absolute in terms, it is not to be construed as exclusive of the authority of the Commonwealth, or against its public policy. It would certainly be against public policy to hold that a local and transient board should have greater authority over the property of the Commonwealth, cared for and controlled by the officers of the Commonwealth, acting under direct authority of the Legislature, than those officers themselves. . . . It follows, therefore, that, although the delegation of authority to local boards of health is general in its terms and purports to embrace all persons and property within the limits of the town, there is an implied exception of such property as is cared for and controlled by the Commonwealth itself, and under its special and peculiar jurisdiction. I. Op. Atty.-Gen. 290.

In *Teasdale v. Newell & Snowling Construction Co.*, 192 Mass. 440, a case arising upon petition of the board of health of the city of Quincy to restrain the defendants from maintaining without a license a stable which they had on the land taken by the Commonwealth to accommodate a large number of horses, and which they were using in performing a contract with the Metropolitan Park Commission, the court said: —

Such an act must be regarded as needful in the proper execution of the powers which the State may exercise over its own property; and the general law made for the regulation of citizens must be held subordinate to this special statute regulating the use of the property of the State unless there is express provision to the contrary.

To summarize: I am of the opinion that the purposes for which the armory is proposed to be used have been authorized by the Legislature, so that the carrying out of these purposes is to be considered the act of an agency of the State; and therefore the general statute prohibiting the holding of public exhibitions or dances without a license from the mayor and aldermen of the city does not apply.

TAXES — APPROVAL BY TAX COMMISSIONER — BOND OF COLLECTOR FOR CITIES.

By Gen. St. 1916, c. 131, the duty is imposed upon the Tax Commissioner to approve the form of bonds of collectors of taxes for cities unless inconsistent with some provision in the city charter.

To the Tax
Commissioner.
1916
May 8.

I beg to acknowledge your request for my opinion as to whether chapter 131 of the General Acts of 1916, imposing upon you the duty of approving the form of bonds required of tax collectors, applies to the bonds of collectors of cities as well as of towns.

Section 2 of chapter 26 of the Revised Laws is as follows: —

Chapter twenty-five and all other laws relative to towns shall apply to cities so far as consistent with the general or special laws relative thereto; and cities shall be subject to the liabilities, and city councils shall have the powers, of towns; the mayor and aldermen shall have the powers and be subject to the liabilities of selectmen, and the city clerks, treasurers, and other city officers, those of corresponding town officers, if no other provisions are made relative to them.

The act of 1916 under consideration is an express amendment of a section of chapter 25 of the Revised Laws. Accordingly, in my opinion the new statute imposes upon you the duty of approving the bonds of collectors of cities in all cases except where there is some provision of law in the charter of a particular city or otherwise which is inconsistent with the performance of such duty by you.

CONSTITUTIONAL LAW — DUE PROCESS OF LAW — COLLATERAL LOAN COMPANY.

It is within the constitutional power of the Legislature to amend the charter of the Collateral Loan Company by requiring it in the future to distribute for charitable purposes the excess of its profits over 8 per cent. and the net proceeds of the sale of unredeemed pledges above the amount of the loan after holding the same one year.

But an act requiring said corporation to turn over to charity the net proceeds of all sales of unredeemed pledges since 1875 above the amount of the loan, unclaimed for more than a year, would be unconstitutional.

You request my opinion as to whether House Bill No. 1320, entitled "An Act relative to the Collateral Loan Company," would be constitutional if enacted. I understand that this bill, which was once reported by your committee, has been recommended to it by the Senate and is now before the committee for further action.

To the
Committee
on Banks and
Banking.
1916
May 8.

Section 1 of the proposed bill restores to the act incorporating the Collateral Loan Company (St. 1859, c. 173) certain sections which were struck out of that act by chapter 65 of the Acts of 1875. The sections which it is thus proposed to restore are as follows: —

Section 8. If the property pledged is not redeemed within the time limited, the same shall be sold at public auction, and the net surplus, after paying loan charges and expenses of all kinds, shall be held one year for the owner; if not then called for, the same shall go into a fund for the year, when the entire forfeiture takes place, called the "Profit and Loss Fund." *Section 9.* All losses on loans from failure of title, or other cause, shall be satisfied from the said profit and loss fund. *Section 10.* The net balance of said fund, at the end of each year, shall be made up annually to the first day of January, and be doled in fuel to the needy, under the direction of the board, during the months of January, February and March. *Section 12.* The whole sum earned each year shall be duly disposed of at the end of the year, the earnings to be divided among the stockholders shall never exceed eight per cent per annum, and the balance, if any, shall go into said profit and loss fund, and be distributed in charity, as hereinbefore provided.

From the time of the original incorporation of this company down to 1875 the provisions then struck out, and now proposed

to be restored, limited the dividends of the company to eight per cent., and required it to distribute the excess of its profits over eight per cent. and the net proceeds of the sale of unredeemed pledges above the amount of the loan, with interest and expenses, after holding one year, to certain charitable purposes. Thus, this corporation was, during the first sixteen years of its existence, in part engaged in the administration of a public charity.

Chapter 65 of the Acts of 1875 struck out from its charter all provisions requiring it to devote any funds however acquired to charitable purposes, and left it an ordinary business corporation. In my opinion, since the enactment of the last-mentioned statute, the Collateral Loan Company can be regarded in no way as holding any of its funds for a charitable purpose. The first section of the proposed bill merely restores the obligation to devote funds to charitable purposes which was in its original charter. In my opinion it is plainly within the power of the Legislature thus to amend the charter of this corporation. This amendment, if enacted, would impose its obligation upon the corporation from the time when the amendment takes effect. Thus, in my opinion section 1 of the proposed bill would be constitutional if enacted.

The second section of the bill raises an entirely different question. It is as follows:—

All surplus proceeds of the sales of unredeemed pledges by the Collateral Loan Company since March twenty-third, eighteen hundred and seventy-five, which have remained unclaimed for more than one year, together with all accumulated interest thereon, shall be paid by the Collateral Loan Company to and shall be expended by the city of Boston for the relief of the poor and needy.

When this corporation makes a sale of an unredeemed pledge for an amount in excess of what is due it from the pledgor, it is under an obligation to repay that amount to the pledgor upon demand at any time within one year after the date of the sale. This provision as to one year is apparently a special statute of limitations imposed in favor of this corpora-

tion against claims of pledgors of this character. After the one-year period has run, the corporation is in precisely the same situation as any debtor against whom a creditor cannot maintain an action by reason of a statute of limitations. It has a right to waive the statutory provision and pay its debt if it chooses, but it cannot be required by legal proceedings to do so. Though the Supreme Court of the United States has decided otherwise under the Federal Constitution (*Campbell v. Holt*, 115 U. S. 620), there is grave doubt, in view of many intimations made by our Supreme Judicial Court, whether the General Court has, under the Constitution of the Commonwealth, any power to repeal or to remove the bar of a statute of limitations after the statutory period has once run. *Bigelow v. Bemis*, 2 Allen, 496, 497; *Prentice v. Dehon*, 10 Allen, 353, 355; *Ball v. Wyeth*, 99 Mass. 338, 339; *Danforth v. Groton Water Co.*, 178 Mass. 472, 476; *Dunbar v. Boston & Providence R.R.*, 181 Mass. 383, 386. If we assume that it cannot do so, the obligation of this corporation to return any surplus proceeds of sales of unredeemed pledges to pledgors has been discharged by the operation of the statute of limitations, and any funds in its hands accruing from such a source have become its own absolute property free from a claim of any sort on the part of any pledgor. On this view it would be beyond the power of the General Court to deprive this corporation of such property without compensation.

On the other hand, if the view of the Supreme Court of the United States be adopted, and it be held that the Legislature may remove the statutory bar in case of debts, even though the statutory period has already run, in that event the Legislature would have no power to do more than restore to the various pledgors their rights of action. To go farther, and to take such property and turn it over to the city of Boston to be distributed for charity, would be taking without due process of law the property of these pledgors. There is no analogy between the provisions of the section under consideration and the existing law as to unclaimed savings bank deposits. Though such deposits are turned over to the Commonwealth, they are

always held by it subject to an obligation to pay over the full amount at any time to any depositor who is able to prove his claim. In my opinion, therefore, section 2 of the proposed bill would be unconstitutional if enacted.

FIREMEN'S RELIEF FUND — WORKMEN'S COMPENSATION ACT —
 "LABORERS, WORKMEN AND MECHANICS."

A regular fireman of the city of Boston who was impressed into service of the Peabody fire department by its chief at a serious fire in that town, and who was injured in performing that duty, is a fireman within the meaning of R. L., c. 32, § 73, as amended by St. 1906, c. 171, and is entitled to share in the benefit of the firemen's relief fund.

A fireman is not a laborer, workman or mechanic within the meaning of St. 1913, c. 807, and one who is injured in the performance of his duty is not debarred by section 5 from sharing in the firemen's relief fund by reason of his having been erroneously paid some compensation on account of the same injury.

To the Com-
 missioners of
 the Firemen's
 Relief Fund.
 1916
 May 11.

You request my opinion upon the question of whether or not your Board may pay from the firemen's relief fund a proper sum for benefits to a fireman who was injured in the following circumstances: A regular fireman of the city of Boston happened to be in the town of Peabody at a time when a serious fire occurred, and was ordered by the chief of the Peabody fire department to assist that department in its work of extinguishing that fire, in obeying which order the Boston fireman was severely injured. I assume that by "chief" is meant chief engineer.

R. L., c. 32, § 73, as amended by St. 1906, c. 171, provides that this fund shall be used "for the relief of firemen who may be injured in the performance of their duty at fires or in going to or returning from fires, and for the relief of widows and children of firemen killed in the performance of their duty. . . ."

Section 74 of the same chapter provides that —

Officers and members in active service in all incorporated protective departments co-operating with fire departments, and any person performing the duties of a fireman in a town having no organized fire department, shall be entitled to the benefits thereof.

Sections 14 and 15 of this chapter give firewards the power to require assistance in extinguishing fires, and to fix a penalty for the refusal to obey any such order.

Section 65 of this chapter provides that —

Engineers shall have and exercise within their district the powers and authority of firewards of towns relative to the extinguishment of fires and the demolition of buildings. . . .

It is to be noted that if these injuries occurred in a town in which no organized fire department existed, this man would, under the provisions of section 74, be entitled to the benefits of this fund. The statute does not in terms cover the case of an impressment into the service of a person in a town which has an organized fire department, but, in my opinion, it was not intended to exclude this class of persons. Where a man is impressed into the service of a fire department by order of the proper authorities, he becomes for the time being a fireman, and it is his duty, as such, to aid in the extinguishment of the fire under the orders of the chief.

In a town where no organized fire department exists, however, the situation is clearly different, for a person who there aids in the extinguishment of a fire cannot become a member of any fire department, for there is none. It seems to me that section 74 was enacted with this difference in view, and was intended to remove, rather than to create, any distinction between persons performing the duties of a fireman in towns having no organized fire department and persons impressed into the service of a regular fire department.

Accordingly, I am of the opinion that if you find that the Boston fireman was impressed into the service of the fire department of the town of Peabody under the provisions of sections 14, 15 and 65 of chapter 32 of the Revised Laws, and that he received his injury in the performance of his duty as such impressed fireman, he is entitled to the benefits of his fund.

You also request my opinion upon the status of certain injured firemen who have claimed compensation under the

provisions of St. 1913, c. 807, and who have received some compensation from the cities or towns by which they were employed by virtue of a ruling of the Industrial Accident Board that such persons came within the class of "laborers, workmen or mechanics," within the meaning of said statute.

The Supreme Judicial Court in *Devney's Case*, 223 Mass. 270, decided March 3, 1916, overruled these decisions of the Industrial Accident Board and decided that a fireman was not entitled to compensation under this act.

St. 1913, c. 807, § 5, provides as follows: —

Any person entitled to receive from the commonwealth or from a county, city, town or district the compensation provided by Part II. of said chapter seven hundred and fifty-one, who is also entitled to a pension by reason of the same injury, shall elect whether he will receive such compensation or such pension, and shall not receive both. In case a person entitled to such compensation from the commonwealth or from a county, city, town or district receives by special act a pension for the same injury, he shall forfeit all claim for compensation, and any compensation received by him or paid by the commonwealth or by the county, city, town or district which employs him for medical or hospital services rendered to him may be recovered back in an action at law. No further payment shall be awarded by vote or otherwise to any person who has claimed and received compensation under this act.

While the prohibition in the last sentence of this section appears to be very broad, I am of the opinion that, taken in connection with the rest of the section which requires that the person must be entitled to receive the compensation in order to have it apply to pensions, this sentence must be construed in a like manner as applying only to persons who rightfully receive compensation under this act, that is, to persons who have a right to participate in either of two funds, and elect to, and do, participate in one.

Accordingly, I am of the opinion that these firemen, whose compensation has now ceased, are not debarred by these facts from receiving the benefits of your fund.

MUNICIPAL LIENS — REPEAL OF LAWS RELATING TO.

If House Bill No. 1943, providing for the repeal of Gen. St. 1915, c. 227, were allowed to become a law there would be no legislation in force, except as to the city of Boston, under which a municipality could establish a lien for the construction of streets, sewers and sidewalks.

You request my opinion upon the question of whether, if House Bill No. 1943, entitled "An Act relative to municipal liens for public improvements," were allowed to become a law, there would remain any statutes under which a lien could be established in favor of municipalities for public improvements.

To the
Governor.
1916
May 15.

This bill provides for the repeal of chapter 227 of the General Acts of 1915, which reads as follows:—

SECTION 1. No municipal lien shall attach to any real estate in consequence of any order of a municipal board or other authority for the construction of a street, sewer or sidewalk until the work shall have been completed and an assessment levied, within one year thereafter, for the benefits conferred upon the various parcels of land benefited by the improvement. The assessment shall be levied upon the parcels of land benefited by the improvement as they existed on the first day of April next preceding the completion of the work. The assessment shall describe by metes and bounds each parcel assessed and shall state the names of the owners of record at the time of the assessment, if the names can reasonably be ascertained; otherwise the assessment may be made to owners unknown. The order of assessment, together with a plan showing in detail the lots assessed, if recorded in the registry of deeds for the county and district wherein the land lies within thirty days after the date of the assessment, shall create a lien on the land which shall remain until the assessment is paid or abated according to law.

SECTION 2. All acts and parts of acts inconsistent herewith are hereby repealed.

SECTION 3. This act shall not apply to the city of Boston.

R. L., c. 8, § 4, provides, in part, as follows:—

In construing statutes the following rules shall be observed, unless their observance would involve a construction inconsistent with the manifest intent of the general court, or repugnant to the context of the same statute; that is to say:—

First, The repeal of an act or resolve shall not revive any previous act or resolve. . . .

The primary inquiry, then, is as to what inconsistencies exist between the provisions of the act of 1915 and the statutes relating to municipal liens in force at the time of the passage of that act.

R. L., c. 49, § 23, provides that —

All assessments and charges for main drains and common sewers, whether in the nature of assessments or charges for the use of such sewers or annual charges or otherwise upon any land which abuts upon a street in which such sewer is laid or otherwise, shall constitute a lien upon said land. The lien shall continue for two years after the assessments or charges have been committed to the collector, or if they are to be paid by instalments, for two years after the last instalment has been committed to the collector unless paid sooner. . . .

By section 45 of this chapter the provisions of section 23 are made to apply to sidewalk assessments.

Section 33 of this chapter provides that assessments for connecting private premises with public sewers "shall be a lien upon the land and shall be added to, and collected as a part of the annual tax for the ensuing year upon such land." There is no limitation upon the time within which a sewer or sidewalk assessment must be made in order to have a lien attach; the time for which the lien continues is limited; and there is no requirement of recording the order of assessment and plan of the lots assessed, except that as to cities section 23 of chapter 50 requires that the original order be recorded within ten days after its passage. In all these respects the provisions of this chapter are inconsistent with the act of 1915.

R. L., c. 50, § 10, provides that —

Assessments for betterments and other public improvements shall constitute a lien upon the land assessed and shall be enforced in the manner provided for the collection of taxes.

R. L., c. 13, § 35, relating to the collection of taxes, provides as follows: —

Taxes assessed upon land, including those assessed under the provisions of sections sixteen, seventeen and eighteen of chapter twelve shall with all incidental charges and fees be a lien thereon from the first

day of May in the year of assessment. Such lien shall terminate at the expiration of two years from the first day of October in said year, if the estate has in the meantime been alienated; otherwise it shall continue until an alienation thereof.

By section 17 of said chapter 50, if the assessment is payable in instalments, the lien continues for two years after the last instalment was committed to the collector.

The time during which an assessment may be made for the laying out of a street or way is limited by section 1 of chapter 50 to two years after the passage of the order authorizing the laying out of such street or way.

The provisions of chapter 50 are thus inconsistent with the act of 1915 in the same respects as the preceding chapter.

The only particular, then, in which the provisions of these chapters can be said not to be inconsistent with the earlier part of the later act is in the bare creation of a lien. But it is to be noted that the latter part of section 1 of the act of 1915 does more than to limit or subject to conditions the operation of the prior statutes as to the enforcement of the lien. It supersedes rather than amends. It provides for the creation of municipal liens and purports to be complete in itself.

For these reasons, I am of the opinion that the previous statutes in so far as they related to the creation of municipal liens for the construction of streets, sewers and sidewalks were repealed by the act of 1915, except as to the city of Boston, and the only question remaining to be considered is whether a ruling that the previous enactments would not be revived by the repeal of the act of 1915 would be "inconsistent with the manifest intent of the General Court, or repugnant to the context of the same statute." Obviously, it could not be the latter, for the bill in question contains only the repealing provision. Whether such a ruling would be determined by the court to be inconsistent with the manifest intent of the Legislature, presents a difficult question. For many years provisions have existed for the establishment of municipal liens and proceedings for their collection, and special provisions have been enacted for the city of Boston. In view of the fact that the provisions

for municipal liens in the city of Boston are left unimpaired, and that the laws pertaining to the establishment of liens in cities and towns have existed for a long period of time, a strong argument might be made that it was manifestly not the intent of the Legislature to repeal all provisions for the establishment of such liens outside of Boston. On the other hand, applying the rules governing the construction of legislative enactments prescribed by R. L., c. 8, § 4, it would seem by the repeal of chapter 227 of the General Acts of 1915 that the provisions of law repealed by the latter statute were not revived upon its repeal.

Consequently, although with some hesitation, I must advise you that I am of the opinion that if the bill in question were allowed to become a law, there would be no legislation in force, except as to Boston, under which a municipality could establish a lien for the construction of streets, sewers and sidewalks.

DENTISTRY — CANDIDATE FOR REGISTRATION — EDUCATIONAL REQUIREMENTS.

A candidate for registration in dentistry is eligible for examination or re-examination after June 1, 1916, even though he has not the educational requirements prescribed by Gen. St. 1915, c. 301, § 5, provided that such candidate had applied for examination and paid his examination fee before this section took effect.

To the Board
of Registration
in Dentistry.
1916
May 17.

You request my opinion upon the following questions:—

1. Has a candidate whose application and fee have been received by the secretary of the Board, and who has not appeared for examination and does not possess a college diploma, any rights as to taking the examination after June 1, 1916?
2. Has a candidate whose application and fee have been received and accepted by the secretary of the Board, and who has taken one examination and failed, and who is not possessed of the educational requirements, any right to a re-examination after June 1, 1916?
3. If these candidates have rights, how far can the Board of Dental Examiners go in permitting re-examination of candidates who were eligible under the old law?

Gen. St. 1915, c. 301, § 5, now requires, among other things, that in order to be eligible for examination a candidate must either be a graduate of a reputable dental college, or, having spent three years in such a college, successfully passed all examinations for the first and second years.

Section 14 of this chapter provides for the repeal of the former laws on this subject, but goes on to say:—

The provisions of this act . . . shall not affect . . . any right accrued or established . . . under the authority of the repealed laws.

This act becomes effective, as to its educational requirements, June 1, 1916.

R. L., c. 77, § 26, as amended by St. 1908, c. 294, which was the law in force at the time of the passage of the above statute, provided, in part, as follows:—

Any person of twenty-one years of age or over, upon payment of a fee of twenty dollars, which shall not be returned to him, may be examined by said board at a regular meeting with reference to his knowledge and skill in dentistry and dental surgery; . . . An applicant who fails to pass a satisfactory examination shall be entitled to one re-examination at any future meeting of the board, free of charge, but for each subsequent examination, he shall pay five dollars. . . .

The candidate having made application and paid the \$20 fee, it would seem that the right to be examined thereby accrued to him and was not affected by the act of 1915, above referred to. Accordingly, I am of the opinion that he is entitled to be examined after June 1, 1916.

Your second question involves similar considerations and, for the reasons above stated, I am of the opinion that such a candidate as you mention is entitled to a re-examination after this date.

In answer to your third question I beg to advise that, in my opinion, your Board should limit the right to examination or re-examination of candidates who are not possessed of the educational requirements prescribed by the later act, after June 1, 1916, to those who have applied for examination and paid their examination fees before that date.

INSURANCE — CASH ASSETS IN EXCESS OF LIABILITIES.

Where a mutual fire insurance company has cash assets in excess of its liabilities to an amount greater than is permitted by St. 1907, c. 576, § 47, this excess is not reduced by the establishment of a guaranty capital and the issuance to trustees of certificates of stock to the amount of such guaranty capital, which are not sold.

To the
Insurance
Commissioner.
1916
May 17.

You have called my attention to the fact that St. 1907, c. 576, § 47, limits the amount of cash assets which a mutual fire insurance company may hold in excess of its liabilities to 2 per cent. of its insurance in force, and that a certain mutual company has a very substantially larger amount of cash assets than is permitted by the foregoing section. It has, under the advice of counsel, sought to avoid the effect of this section and to reduce its cash assets by establishing a guaranty capital of \$200,000, issuing to trustees certificates of stock to this amount, which are not being sold, and contends that thereby a liability of \$200,000 is created which is to be deducted from its assets, and that accordingly it no longer has cash assets in excess of 2 per cent. of its insurance in force.

You request my opinion as to whether the establishment of a guaranty capital in this manner lawfully accomplishes the result sought.

Upon its face this at the best seems to be a colorable transaction, and I should not be inclined to advise you, in your administrative capacity, to admit its efficacy unless the law clearly required it. However, in the present case it seems to me manifest that the excess of cash assets of this company remains just the same as before.

Without considering whether the statute requires payment for such stock at par in cash, such a company could not lawfully create a guaranty capital and give it away. Clearly, the stock could lawfully be issued in such a way as to create a liability only by the receipt of its fair value. In a case like the present there could seem to be no question but what the stock is worth par, in view of the company's excess of cash assets over liabilities. Upon the receipt of \$200,000 for the

\$200,000 of stock, the amounts would just cancel each other and the excess of cash assets would remain the same. If the stock after issuance were purchased by the company, such payment would be made from the cash assets of the company. If the company can lawfully invest a portion of its cash assets in the purchase of its own guaranty capital, the stock would become a part of its cash assets, and the net result would remain unchanged; that is, the excess would still be the same.

In other words, any issue of this stock in such a way as to be a lawful issue would leave the excess of cash assets the same as before. Any unlawful issue of this stock cannot properly be regarded as creating a liability.

Accordingly, I am of the opinion that the means which have been employed in this case have not resulted in reducing the excess of cash assets held by the company.

CONSTITUTIONAL LAW — REGULATION OF STREETS — SOLICITATION OF BUSINESS ON.

Senate Bill No. 482, making it an offense to solicit any one other than an acquaintance upon any public sidewalk in front of a retail store, other than one in which the solicitor is interested, to purchase at another store goods similar in kind to any kept or displayed in such store would be constitutional, if enacted, as being a reasonable regulation of the use of the highways. See Gen. St. 1916, c. 289.

You request my opinion upon the constitutionality of Senate Bill No. 482, entitled "An Act to prohibit unfair and malicious solicitation of business on public ways and sidewalks," which reads as follows: —

To the
Committee on
Bills in the
Third Reading.
1916
May 24.

Whoever, upon any public sidewalk in front of any retail store other than his own, or one in which he is employed, accosts any person not acquainted with him, and there tries to induce such person to purchase at any other store or place, at retail, merchandise similar in kind to any kept or displayed for sale in such store, shall be punished by fine not exceeding one hundred dollars.

The title of this bill would seem to be inappropriate, for the reason that by its terms the solicitation prohibited is not

limited to unfair and malicious solicitation. I suggest, therefore, that the title be amended by striking out the words "unfair and malicious," in order to indicate more accurately the scope of the bill and to obviate any ambiguity between its title and its text.

If this is done, I am of the opinion that the constitutionality of the bill could be sustained, if enacted, as a reasonable regulation of the use of the highways.

A somewhat similar question arose in the case of *Commonwealth v. Ellis*, 158 Mass. 555, where the constitutionality of a city ordinance which prohibited the selling of any goods in the streets without a permit from the superintendent of streets was assailed. The court, in upholding the constitutionality of this ordinance, said:—

Any one who has observed the obstruction to travel and the general inconvenience which are caused by a stationary object in our crowded and narrow streets, would be slow to declare unreasonable a prohibition intended to prevent that inconvenience. We are of opinion, both on principle and on authority, that for this purpose the city council lawfully may forbid public selling in the streets.

See also *Commonwealth v. McCafferty*, 145 Mass. 384.

It is true that what is sought to be regulated by the bill is different from what was regulated by the ordinance above referred to; the bill prohibits solicitations, while the ordinance applied only to sales. Furthermore, the bill deals with only a particular kind of solicitation. Whether there is more reason to regulate this particular class of solicitations than solicitations in general, primarily is for the Legislature to determine, and I am unable to say that solicitations of the kind included in the bill are not so much more likely to create disturbances and obstructions in the highway than solicitations generally, as to warrant such a classification by the Legislature.

It might be urged with some force that the basing of the exception upon the fact of acquaintance with the solicitor rather than the acquaintance of the solicitor with the person accosted is unreasonable and arbitrary, in that it makes the

test of a man's criminality the memory or state of mind of another. To obviate this objection I advise that the bill be amended by inserting the word "being" after the word "not" at the end of the second line.

TAXATION — DOMESTIC CORPORATIONS — DEDUCTIONS.

Notes, bills receivable, cash on deposit in banks or trust companies and other intangible property of a like nature belonging to a domestic corporation are not deductible as property situated in another State and subject to taxation therein in the determination of its franchise tax under the provisions of St. 1909, c. 490, Pt. III., § 41.

I beg to acknowledge your request for my opinion as to whether, under St. 1909, c. 490, Pt. III., § 41, the deduction described as "the value of its property situated in another State or country and subject to taxation therein," to be made in determining the taxable value of the franchise of a domestic corporation, should include notes, bills receivable, cash and other items of similar intangible property.

To the Tax
Commissioner.
1916
May 24.

Whatever doubt may have existed as to the interpretation to be given this provision of law in the past appears to have been entirely removed by the decision of the court in *Bellows Falls Power Co. v. Commonwealth*, 222 Mass. 51. In that case the petitioner, a Massachusetts corporation, owned stock in a Vermont corporation. Under the laws of Vermont all shares of stock in Vermont corporations are taxable in that State. The question arose whether, in determining the taxable value of the franchise of the corporation, such Vermont stock should be regarded as subject to taxation in this Commonwealth if owned by a natural person, and also whether it was situated in another State and subject to taxation therein. The court held that notwithstanding the statutes of Vermont this Commonwealth had the right to tax shares in Vermont corporations when owned by residents of the Commonwealth, and thus held that these shares of stock were "securities which if owned by a natural person resident in this Commonwealth would be liable to taxation."

The court also held that such shares of stock in a Vermont corporation were not "property situated in another State and subject to taxation therein," within the meaning of section 41 of the tax act. The court says, at page 63: —

It follows from what has been said that the shares of stock are not "property situated in another State and subject to taxation therein." The context in which these words occur in our tax law and its other general provisions demonstrate that these words refer to the kind of property which, if owned by an individual and situated and taxed in another State, would be exempt from taxation here, such as real estate, and "merchandise, machinery and animals." St. 1909, c. 516, § 1; *Union Refrigerator Transit Co. v. Kentucky*, 199 U. S. 194. There are substantial, although intangible, elements of property in shares of stock in a corporation which attach to the owner resident in this Commonwealth.

The paragraph just quoted is a plain statement that the provision in the tax act under consideration, permitting a deduction of "property situated in another State and subject to taxation therein," applies only to tangible property which, if situated and taxed in another State, is, by the decision of the Supreme Court of the United States cited, necessarily exempt from taxation in the State of the residence of the owner. This does not apply to items of intangible property of the character referred to by you. Whether taxable in another State or not, there are "substantial, although intangible, elements of property" in items of this character "which attach to the owner resident in this Commonwealth."

Apparently, in the main, it is the purpose of the statute providing for the payment of a domestic corporation franchise tax that a corporation in the determination of its franchise tax should be treated upon substantially the same basis as an individual in the assessment of his property taxes. Accordingly, deductions are made from the fair cash value of all the shares of the corporation of the value of all property owned by it upon which it is taxable in the Commonwealth or which would be exempt from taxation if held by an individual. An individual resident in Massachusetts is taxable here upon all intangible personal property whether or not it has a situs for

purposes of taxation outside the Commonwealth. An individual, however, is, by the decision of the Supreme Court of the United States already referred to, exempt from taxation upon all tangible property permanently situated in other jurisdictions. The ruling of our Supreme Judicial Court, which I have quoted, seems to place individuals resident in Massachusetts and domestic corporations upon precisely the same basis.

Accordingly, I must advise you that, in accordance with the ruling of our court above quoted, notes, bills receivable, cash on deposit in banks or trust companies and other intangible property of a like nature are not deductible as property situated in another State or country and subject to taxation therein, in the determination of the domestic corporation franchise tax.

CONSTITUTIONAL LAW — POLICE POWER — POWER OF STATE TO PROHIBIT THE USE OF TRADING STAMPS.

Senate Document No. 438, which prohibits the selling or giving, in connection with the sale of any article of merchandise, of any trading stamps or similar devices entitling the holder to either a cash or property premium, would be unconstitutional if enacted, inasmuch as the bill prohibits the giving of a cash premium to be paid by the seller independently of any arrangement by him with any other person, *i.e.*, a discount. But *it seems* it would be within the constitutional power of the Legislature to prohibit the dealing in trading stamps or similar devices in which any person other than the vendor or vendee of the merchandise sold has an interest.

I beg to acknowledge the receipt of your letter in which you request my opinion upon the constitutionality of House bill printed as Senate No. 438. That bill is as follows: —

To the
Committee on
Bills in the
Third Reading.
1916
May 27.

SECTION 1. No person, firm or corporation shall, in connection with the sale of any article or any merchandise whatsoever, sell, give or deliver any trading stamps, coupons or similar devices, whether such trading stamps, coupons or similar devices are or are not attached to or form a part of the article or package of merchandise sold. This act shall apply to any device which entitles the holder thereof, when such device is presented alone or in connection with others, to a cash premium or property premium.

SECTION 2. A violation of this act shall be a misdemeanor, and shall

be punished by a fine of not less than ten nor more than one hundred dollars.

SECTION 3. This act shall take effect on the first day of January, nineteen hundred and seventeen.

Statutes the provisions of which were similar to those of the proposed act have been considered by the Supreme Judicial Court on several occasions. In but two instances has the Supreme Judicial Court expressed any opinion as to the constitutionality of acts similar in character; *i.e.*, in the case of *O'Keeffe v. Somerville*, 190 Mass. 110, and in an Opinion of the Justices, rendered to the House of Representatives in 1911 and reported in 208 Mass. 607, in which the justices unanimously were of the opinion that statutes of this character were unconstitutional as violating the provisions of the Fourteenth Amendment to the Constitution of the United States and the Declaration of Rights, Article I., of the Massachusetts Constitution.

My immediate predecessor, Hon. Thomas J. Boynton, expressed similar views in relation to a proposed act to impose a license fee of \$6,000 upon persons engaged in the business of furnishing trading stamps.

The Supreme Court of the United States, on March 6, 1916, in three cases, namely, *Rast v. Van Deman & Lewis*, *Tanner v. Little* and *Pitney v. Washington*, held that the regulation or prohibition of the giving of trading stamps or other devices in connection with the sale of goods, entitling the purchaser to anything other than cash in addition to the principal article of purchase, under the police power of a State was not in violation of any rights guaranteed by the Fourteenth Amendment or other provisions of the Constitution of the United States. The court expressly stated that in arriving at this decision it in no way intimated what its view would be in relation to the giving of trading stamps or other devices redeemable solely in cash.

It is very plain, therefore, that up to March 6, 1916, it would have been the duty of the Attorney-General of this Commonwealth to advise your committee that the proposed

act would be unconstitutional. It follows that the question presented for me to answer is an extremely delicate one in that it requires a speculation upon what effect these recent decisions of the United States Supreme Court may have upon the views heretofore expressed by the justices of our Supreme Judicial Court. It will be observed that in the opinion of the justices to the House of Representatives, above referred to, the justices based their opinion not only upon the Fourteenth Amendment to the United States Constitution but upon the Declaration of Rights, and, if our court is still of the opinion that the Declaration of Rights of the Constitution of Massachusetts prohibits the enactment of legislation of the character then in question, it follows that the decisions of the Supreme Court of the United States are not controlling, and that Senate No. 438 would be unconstitutional. In so far as the opinion of the justices of the Supreme Judicial Court was based upon the Fourteenth Amendment to the Constitution of the United States, the decisions of the United States Supreme Court are controlling.

Furthermore, it should be noted that opinions rendered to the Legislature, or either branch thereof, are not to receive the same weight as decisions in actual cases before the court, as was well stated in *Opinion of the Justices*, 214 Mass. 599, as follows: —

It has been said repeatedly that answers given by the justices to questions propounded by the Legislature have not the binding force of decisions of the court, but are the opinions of the individual justices acting as constitutional advisers to a co-ordinate department of the government. The doctrine of *stare decisis* does not apply to them, but they are open to reconsideration and revision.

These decisions being brought to your attention, it would seem that you are as competent as the Attorney-General to determine to what extent, if at all, the justices of the Supreme Judicial Court based their previous opinions upon the provisions of the Declaration of Rights in distinction from those of the Fourteenth Amendment, and to what extent they would be

influenced in passing upon the constitutionality of a statute of this character by the reasons advanced by the Supreme Court of the United States. In this connection it should be borne in mind that the Supreme Judicial Court has said, in the case of *Commonwealth v. Strauss*, 191 Mass. 545, at 550, that —

Rights relied upon under the Fourteenth Amendment to the Constitution of the United States, and under the Declaration of Rights in the Constitution of Massachusetts, are substantially the same.

Although I feel, as I have before stated, that my opinion in relation to the constitutionality of the proposed act can be of but little value to your committee, nevertheless, I deem it my duty, in view of the provisions of section 7 of chapter 7 of the Revised Laws, as you have required my opinion, to express my views in relation to the proposed act. As I interpret this bill absolutely to prohibit the giving of any stamp or other device entitling the holder thereof to a cash premium to be paid by the seller, independently of any agreement or arrangement by him with any person other than the holder of such stamp or device, I am of the opinion, in the light of the decisions above referred to, that the bill would be unconstitutional if enacted. On the other hand, if the provisions of the bill are limited to the giving of or dealing in stamps or other similar devices in which any person other than the vendor or vendee of the merchandise sold has an interest, by contract, arrangement or otherwise, I can see no sound reason why it should be declared unconstitutional. I have always felt that if, in the opinion of the Legislature, conditions have arisen in connection with the use of trading stamps, either by reason of the form of contract or the methods of distribution and sale employed, which tend to the creation of a monopoly or to the restraint of trade, it is well within the police power of the State to prohibit the use of stamps in such a way.

It may be that the Legislature has ascertained that the control of the business of the issuance of trading stamps in the State, or portions thereof, has, by the operation of methods adopted by trading stamp companies, become largely centered

in one company. This was a condition found to exist in the city of Boston by the Supreme Judicial Court in the case of *Merchants Legal Stamp Co. v. Murphy*, 220 Mass. 281. It may be that the Legislature has found, as was expressed in that case, that trading stamps now have become "an essential element of a form of bargain and sale which a very appreciable portion of the public demands." It may be that in the judgment of the Legislature, in many communities in the State where trading stamps have become of general use, competitive stores cannot be successfully opened without the use of the same kind of trading stamps as are used by their competitors, and in this way the trading stamp companies have it largely in their power to restrain competition in those communities. That the Legislature has the power to deal with contracts tending to create monopolies or tending to restrain trade seems to be unquestionable. *Commonwealth v. Strauss*, *supra*. In my opinion the Legislature has an equal power to deal with methods and schemes of business which tend to create a like condition. As was said in the case of *Louisville & Nashville R.R. v. Kentucky*, 161 U. S. 677, at 701, cited with approval by our own court in the case of *Commonwealth v. Strauss*, *supra*:—

The general rule holds good that whatever is contrary to public policy or inimical to the public interests is subject to the police power of the State, and within legislative control, and in the exertion of such power the Legislature is vested with a large discretion, which, if exercised *bona fide* for the protection of the public, is beyond the reach of judicial inquiry.

These considerations induce me to believe that if the Legislature finds conditions to exist such as I have before observed, it has the power, notwithstanding any provisions of the Declaration of Rights of the Constitution of Massachusetts, to pass legislation fairly adapted to correct these conditions.

PAWNBROKERS — INTEREST ON SMALL LOANS.

The rate of interest which may be charged by pawnbrokers for small loans is not affected by St. 1911, c. 727, § 7, as amended by Gen. St. 1916, c. 224.

To the
Supervisor of
Loan Agencies,
1916
June 3.

I beg to acknowledge your letter in which you request my opinion as to whether the rate of interest to be charged by pawnbrokers is limited by the provisions of section 7 of chapter 727 of the Acts of 1911, as amended by chapter 224 of the General Acts of 1916. Said section, as amended, reads as follows: —

The supervisor shall establish the rate of interest to be collected, and in fixing said rate shall have due regard to the amount of the loan and the nature of the security and the time for which the loan is made; but the total amount to be paid on any loan for interest and expenses shall not in the aggregate exceed an amount equivalent to three per cent a month on the amount actually received by the borrower, computed on unpaid balances; and no licensee or company or association to which this act applies shall charge or receive upon any loan a greater rate of interest than that fixed by the supervisor. No charge, bonus, fee, expense or demand of any nature whatsoever, except as above provided, shall be made upon loans to which this act relates.

It is my view that said amendment of section 7 in no way enlarged the classes of persons or the classes of loans included within the provisions of St. 1911, c. 727, and amendments thereof. The answer to your inquiry, therefore, is dependent upon the interpretation of other provisions of said chapter 727.

At the time of the passage of said chapter 727 there were in chapter 102 of the Revised Laws distinct provisions relating to pawnbrokers and to persons other than pawnbrokers engaged in making small loans. Section 3 of said chapter 727, as originally passed, provided: —

No person, partnership, corporation or association shall directly or indirectly engage in the business of making loans of three hundred dollars or less, if the amount to be paid on any such loan, for interest and expenses, exceeds in the aggregate an amount equivalent to twelve per cent per annum upon the sum loaned, without first obtaining from the supervisor of loan agencies a license to carry on the said business in the city or town in which the business is to be transacted.

This section, standing alone, would necessarily include pawnbrokers where the amount of a loan made by pawnbrokers was not in excess of \$300. But this section must be interpreted in the light of other provisions of the act in order to determine the intent of the Legislature. Section 21 of said chapter amended section 41 of chapter 102 of the Revised Laws so as to read as follows:—

The board which grants licenses to pawnbrokers shall from time to time establish regulations to the satisfaction of the supervisor of loan agencies, relative to the business carried on and the rate of interest to be charged by them; and a pawnbroker shall not charge or receive upon any loan a greater rate of interest than that fixed by the licensing board.

This section, taken in connection with the fact that, under the provisions of section 24 of said chapter 727, section 60 and sections 57, 58, 59, 61, 62, 63, 64, 65, 66, 67 and 68 of chapter 102 of the Revised Laws were specifically repealed, indicates to my mind that it was the intention of the Legislature to leave the provisions of sections 33 to 45, inclusive, of chapter 102 of the Revised Laws unaffected except in so far as they were affected by the provisions of section 21 of said chapter 727.

In my judgment the result is that pawnbrokers and the rates to be charged by them are in no way subject to the provisions of said chapter 727 and the amendments thereof, except that the rates established as to pawnbrokers by licensing boards, under the provisions of chapter 102 of the Revised Laws, are subject to the approval of the Supervisor of Loan Agencies.

Accordingly, I am of the opinion that the rates that may be charged by pawnbrokers are not subject to or controlled by the provisions of section 7, as amended by chapter 224 of the General Acts of 1916.

COLD STORAGE — REPORTS TO STATE DEPARTMENT OF HEALTH.

The report required to be made to the State Department of Health by cold-storage companies by St. 1912, c. 652, § 2, should include a report of broken eggs as well as whole eggs.

Under St. 1912, c. 652, § 2, the State Department of Health may require cold-storage warehouses to report the number of pounds of articles of food placed in cold storage.

To the State
Department
of Health.
1916
June 8.

You ask for the construction of St. 1912, c. 652, § 2, with reference to the cold storage of eggs and articles of food. This section refers to licenses issued by the State Department of Health for cold-storage and refrigerating warehouses, and reads, in part, as follows: —

. . . Every such licensee shall furthermore submit a quarterly report to the state board of health on a printed form to be provided by the board. The report shall be filed on or before the twenty-fifth day of January, April, July and October of each year, and it shall state the quantities of articles of food placed in cold storage during the three months preceding the first day of the said months, respectively, and also the quantities of butter and eggs held on the first day of the month in which the report is filed.

You ask, "Does the word 'eggs,' as used in this connection, mean only eggs in the shell, or does it also include the broken-out eggs?" You also inquire if your department can insist upon such warehouses reporting to your department the number of pounds of articles of food placed in cold storage, instead of reporting the number of packages of food without setting forth the weight of the same.

This statute was intended to provide supervision by the health authorities of food products kept in cold-storage warehouses, and is clearly a health measure. In order to secure proper inspection and regulation, reports must be filed with the State Department of Health, as provided in section 2.

Section 8 provides that "broken eggs packed in cans, if not intended for use as food," shall be marked in a way to indicate that fact. There seems to be as much reason for requiring reports to be made of broken eggs as of whole eggs, and said

provision of section 8 gives force to the construction that under the provisions of the act an egg is to be considered an egg, whether in the shell or broken and packed in a can. Accordingly, I am of the opinion that broken eggs are "eggs" within the provisions of said section 2.

I am also of the opinion that the State Department of Health may insist upon statements of the exact quantities of food products contained in such warehouses, either by weight or bulk as it may determine, in order properly to supervise and regulate the cold storage of food products.

WITNESSES — POWER OF STATE BOARD OF LABOR AND INDUSTRIES TO SUMMON.

Under an order passed by the House of Representatives requiring the State Board of Labor and Industries to inquire as to whether certain telegraph operators were discharged by a telegraph company because they were members of a union, this board does not have the power to summon witnesses and require the production of books and papers in relation thereto.

I acknowledge receipt of your letter requesting my opinion upon the question of whether your Board has the power to summon witnesses and require the production of papers in relation to the subject of the inquiry contained in an order passed by the House of Representatives. Said order is as follows:—

To the State
Board of Labor
and Industries.
1916
June 19.

Ordered, That the State Board of Labor and Industries be required to inquire as to whether the recent discharge of telegraph operators by the Western Union Telegraph Company in the city of Boston was because of membership in the Commercial Telegraphers Union of America, an organization composed of commercial telegraphers in the employ of the various telegraph companies; and urge upon all parties at interest the necessity of taking such action as will prevent a strike, which would seriously handicap the commercial and industrial activities of the entire country.

Many of the boards and departments of the Commonwealth have been given express power to summon witnesses and re-

quire the production of papers, instances of which are the State Board of Conciliation and Arbitration, the Industrial Accident Board, the Massachusetts Highway Commission, the Civil Service Commission and the Bureau of Statistics. That this power cannot be implied as reasonably incidental to carrying out the duties of your Board would seem clear, for otherwise the express power given to the boards above mentioned would become meaningless and mere surplusage, so that, unless this power was conferred upon your Board by said order, your question must be answered in the negative.

The House of Representatives undoubtedly has the power to summon witnesses and to compel the production of papers, at least where the inquiry is germane to proposed legislation, and this power may be exercised either directly or by means of committees. *Burnham v. Morrissey*, 14 Gray, 226.

In that case the court said:—

We therefore think it clear that it [the House of Representatives] has the constitutional right to take evidence, to summon witnesses, and to compel them to attend and to testify. This power to summon and examine witnesses it may exercise by means of committees.

It is extremely doubtful whether this power could be delegated by the House to State departments, for it must be borne in mind that the House of Representatives is not the Legislature, but only a part of it, and therefore an order of the House is not equivalent to an act of the Legislature. It is, however, unnecessary for the purposes of this opinion to decide this question, for the order does not purport, at least expressly, to convey this power; and I am of the opinion, for the reasons above indicated, that this power is not to be implied.

The answer to your question, therefore, must be in the negative.

HAWKERS AND PEDLERS — RIGHT OF MINOR TO BE LICENSED AS.

A boy fifteen years of age may be licensed as a hawker and pedler under the provisions of R. L., c. 65, as amended by Gen. St. 1916, c. 242, at least if an employment certificate has been issued to him by the proper school authorities.

You request my opinion as to whether you have authority to grant a hawker's and pedler's license for the town of Clarksburg to a boy fifteen years of age, residing in North Adams, whose application is accompanied by the certificates required by section 19 of chapter 65 of the Revised Laws, signed by a majority of the selectmen of Clarksburg.

To the Com-
missioner of
Weights and
Measures.
1916
June 22.

Chapter 65 of the Revised Laws, as amended by chapter 242 of the General Acts of 1916, does not appear to contain any provision regulating the issuance of such licenses by you to minors. Section 17, which provides for the regulation by cities and towns of sales by minors, applies only to the sale by hawkers and pedlers of the articles mentioned in section 15. These articles may be sold without a State license, and cities and towns are authorized to regulate only the sale of such articles. They have no authority under either section 15 or section 17 to impose any restrictions upon or otherwise to regulate the sale of articles not mentioned in section 15. A license from you for the sale of such articles is plainly required by section 19, whether the hawker and pedler be a minor or an adult.

Sections 11 to 15, inclusive, of chapter 831 of the Acts of 1913 regulate the employment of minors in certain street trades, so called. Section 11 prohibits a boy under twelve years of age or a girl under eighteen years of age, in a city having a population of over 50,000, from selling any articles of merchandise of any description in any street or public place.

Sections 12 to 14, inclusive, prohibit any boy under sixteen years of age, in any city having a population of over 50,000, from selling any articles of merchandise in any street or public

place unless there has been issued to him by the school authorities both an employment certificate, as provided by law, and a special badge authorizing him to engage in such street trades.

Section 15 forbids any boy under sixteen years of age to sell any articles of merchandise in any street or public place in any city or town after 9 o'clock in the evening or before 5 o'clock in the morning, in any event, and during school hours, unless provided with an employment certificate.

While these sections do not purport to be a limitation upon your authority to issue hawkers' and pedlers' licenses, in my opinion, in exercising the discretion granted to you, it is proper for you to decline to issue such licenses to minors who are subject to the requirements of these sections unless they have complied therewith.

The result is that I advise you that you have authority to grant a hawker's and pedler's license for the town of Clarksburg to a boy fifteen years of age, and that it is appropriate for you to do so if he submits to you with his application an employment certificate issued by the school authorities of North Adams permitting him to engage in such employment.

AID TO MOTHER WITH DEPENDENT CHILDREN — POWER OF OVERSEERS OF POOR TO REMOVE TO PLACE OF SETTLEMENT.

Neither the overseers of the poor of a city or town which renders aid under St. 1913, c. 763, to a mother with dependent children under the age of fourteen years who has no settlement in such city or town, nor the overseers of the poor of the city or town in which she may have a settlement, can cause the removal of such family to the city or town of settlement.

You have requested my opinion upon the following questions with reference to families aided under the provisions of chapter 763 of the Acts of 1913: —

1. Have overseers of the poor rendering the aid authority to cause the removal of families to the city or town of legal settlement?
2. Have overseers of the poor of the city or town of legal settlement authority to remove the families from the city or town granting the aid?
3. If overseers of the poor have authority of removal, and if the families

are supported in a place in which they have no settlement, would the place liable for their support be required to pay more than at the rate of \$2 a week if it causes the families to be removed within thirty days after receiving legal notice that such support has been furnished, as provided in section 19, chapter 81, Revised Laws?

St. 1913, c. 763, § 1, provides: —

In every city and town the overseers of the poor shall, subject to the provisions of the subsequent sections of this act, aid all mothers with dependent children under fourteen years of age, if such mothers are fit to bring up their children. The aid furnished shall be sufficient to enable the mothers to bring up their children properly in their own homes; and such mothers and their children shall not be deemed to be paupers by reason of receiving aid as aforesaid.

Section 6 provides: —

In respect to all mothers in receipt of aid hereunder the city or town rendering the aid shall be reimbursed by the commonwealth, after approval of the bills by the state board of charity, for one third of the amount of the aid given. If the mother so aided has no settlement, the city or town shall be reimbursed for the total amount of the aid given, after approval of the bills by the state board of charity as aforesaid. If the mother so aided has a lawful settlement in another city or town, two thirds of the amount of such aid given may be recovered in an action of contract against the city or town liable therefor in accordance with the provisions of chapter eighty-one of the Revised Laws and acts in amendment thereof and in addition thereto.

R. L., c. 81, §§ 17, 18, 19, 32 and 33, are as follows: —

SECTION 17. The overseers of the poor, in their respective places, shall provide for the immediate comfort and relief of all persons residing or found therein, having lawful settlements in other places, when they fall into distress and stand in need of immediate relief, and until they are removed to the places of their lawful settlements. The expense thereof and of their removal, or burial in case of their decease, may be recovered in an action of contract against the place liable therefor, if commenced within two years after the cause of action arises, but nothing shall be recovered for relief furnished more than three months prior to notice thereof given to the defendant.

SECTION 18. A judgment for the plaintiff in such action shall be conclusive as to the settlement of such pauper in any future action between the same parties for his support.

SECTION 19. If a pauper is supported in a place in which he has no settlement, the place liable for his support shall not be required to pay therefor more than at the rate of two dollars a week if it causes him to be removed within thirty days after receiving legal notice that such support has been furnished.

SECTION 32. The overseers of a place to which a person has actually become chargeable may give written notice thereof to, and request his removal by, one or more of the overseers of the place where his settlement is supposed to be, who may, by an order in writing, directed to a person therein designated, cause such removal to be made.

SECTION 33. If within one month after receiving such notice, the overseers of the latter place do not cause such removal to be made or a statement in writing signed by one or more of them of their objections to the removal to be transmitted to the overseers requesting such removal, the overseers who requested the removal may, by a written order directed to a person therein designated, cause the pauper to be removed to the place of his supposed settlement; and the overseers thereof shall receive and provide for him; and such place shall be liable in an action to the place incurring the same for the expenses of his support and removal, and shall be barred from contesting the question of settlement in such action unless the settlement is denied in said statement.

Briefly stated, the question presented is as to the intention of the Legislature in providing in the 1913 act that "two thirds of the amount of such aid given may be recovered in an action of contract against the city or town liable therefor in accordance with the provisions of chapter eighty-one of the Revised Laws. . . ."

While this language is far from clear, I am of the opinion that it was the intention of the Legislature, by the reference made to the Revised Laws, to refer merely to the manner and conditions in accordance with which suit might be maintained, and not thereby to incorporate all of the incidental provisions with reference to the treatment of paupers found in chapter 81.

It is to be noted that the primary purpose of the 1913 act seems to be to provide for the care of young children by their mothers "in their own homes." There are minute provisions for the inspection of these homes and investigation as to the

kind of bringing up which the children would be likely to receive therein.

If the overseers of the poor, either in the town aiding or in the town of settlement, have the right to remove the family, this purpose of the act would be defeated.

Furthermore, it is to be noted that the act expressly provides that "such mothers and their children shall not be deemed to be *paupers* by reason of receiving aid as aforesaid." The provision of R. L., c. 81, § 19, limiting the amount of recovery to \$2 a week if the place of settlement "causes him to be removed within thirty days after receiving legal notice that such support has been furnished," expressly applies to "a pauper." Accordingly, I am of the opinion that the terms of this section are not applicable to the aid given under the 1913 act, despite the reference therein to chapter 81 of the Revised Laws.

The provisions of R. L., c. 81, §§ 32 and 33, are not necessary for the determination of the method of procedure in an action to recover against the city or town of settlement for aid furnished. Full provision for such action is found in sections 17 and 18.

While the matter is by no means free from doubt, I am of the opinion, for the reasons stated above, that your first two questions are to be answered in the negative. Such answer makes it unnecessary to consider the third question.

Of course, the foregoing opinion would not prevent the overseers of the poor from advising or assisting the mother in voluntarily moving to her place of settlement. I have assumed that your questions related to causing a removal against the wishes of the mother.

FIRE PREVENTION COMMISSIONER — FIXTURES — AUTOMATIC SPRINKLER SYSTEM.

Under the facts stated, an automatic sprinkler system upon being installed in a building becomes a part of the real estate, so that an order by the Fire Prevention Commissioner under St. 1914, c. 795, to install such a system in a building would apply under section 22 of this act to the owner of the premises and not to the occupant.

To the Fire
Prevention
Commissioner.
1916
June 24.
—

You have requested my opinion upon the question of whether an order made by you, requiring the installation of automatic sprinklers in a building which has been leased by the owner, applies to the occupant of the premises or to the owner.

St. 1914, c. 795, § 22, provides, in part, as follows: —

In any case where buildings or other premises are owned by one person and occupied by another under lease or otherwise, the orders of the commissioner shall apply to the occupant alone, except where such rules or orders require the making of additions to or changes in the premises themselves, such as would immediately become real estate and be the property of the owner of the premises. In such cases the rules or orders shall affect the owner and not the occupant, . . .

Our courts have repeatedly said that the question of whether an article attached to a building becomes a part of the real estate is a mixed question of law and fact, and that, as bearing on this question, "the nature of the article and the object, the effect and the mode of annexation, are all to be considered." You state that the sprinkler consists of a series of pipes extending up through the house between the walls, with pipes branching off at each ceiling and equipped every ten feet or so with heads; also that in making an equipment it becomes necessary to cut holes in the walls and sometimes in the floors, and that in installing such a system it is necessary to fit it to the house so much in detail that it would be impracticable, if not impossible, to remove the sprinkler system from a building where it had once been installed to use in another building.

Although the law regards with greater favor the rights of a tenant as against his landlord to remove fixtures installed by him than is accorded to persons standing in a different

relation to the landowner, I beg to advise that, upon the whole, I am of the opinion that, in the absence of any agreement to the contrary between the landlord and tenant, an automatic sprinkler such as you have described would, upon becoming installed in a building, become a part of the real estate even as between landlord and tenant, and consequently that your order to install such sprinklers would apply to the owner of the premises and not to the occupant.

OFFICE, TENURE OF — WHEN ENDED BY ABOLITION — COMMISSION ON MENTAL DISEASES — COMMISSION ON WATERWAYS AND PUBLIC LANDS — BUREAU OF PRISONS — SUPERVISOR OF ADMINISTRATION.

Under Gen. St. 1916, cc. 285, 288 and 296, providing for the creation of the Massachusetts Commission on Mental Diseases, the Commission on Waterways and Public Lands and the Bureau of Prisons, respectively, and the abolition of the boards by which the powers conferred on the new commissioners were formerly exercised, the members of the old boards continued in office until the appointment and qualification of their successors.

Under Gen. St. 1916, c. 241, providing for the abolition of the Board of Prison Commissioners, the offices of chairman and secretary thereof, the office of deputy commissioner, the Board of Parole for the State Prison and the Massachusetts Reformatory, and the Board of Parole for the Reformatory for Women, and for the transfer of the duties formerly exercised by them to a new commission, the tenure of office of the members of the boards so abolished, by the terms of the act, was terminated on July 1, 1916.

I beg to acknowledge the receipt of your communication requesting my opinion in relation to the following: —

To the
Governor.
1916
June 28.

Chapter 285 of the General Acts of the year 1916, entitled "An Act to abolish the State Board of Insanity and to establish the Massachusetts Commission on Mental Diseases," provides that so much of this act as authorizes the appointment of a commission on mental diseases shall take effect upon its passage. This act received executive approval June 1, 1916. In your opinion do the present members of the Insanity Board continue in office until their successors are appointed and qualified, or does the act compel the Governor to make appointments to take over the work at a specified date, and in the event of his not so doing, will it cause a discontinuance of the work of the Board?

In connection with this act there was also passed an act creating a

commission on waterways and abolishing two other boards, as set forth in chapter 288 of the General Acts of 1916. And in further connection with the matter a new Bureau of Prisons was established by chapter 241 of the General Acts of 1916, and further still, by chapter 296 of the General Acts, a Supervisor of Administration was provided for. In these four new acts there is a provision that the boards doing like work shall be abolished, and your opinion is requested in regard to these last three, in substance the same as requested with reference to the first heretofore mentioned, namely, do the old boards hold over until their successors are appointed and qualified, or is the Governor obliged to make appointments at or before a specific date?

Section 9 of chapter 285 of the General Acts of 1916 provides: —

So much of this act as authorizes the appointment of a commission on mental diseases shall take effect upon its passage. The other provisions hereof shall take effect upon the appointment and qualification of the members thereof, but not before the first day of August, nineteen hundred and sixteen.

It follows that the provisions of the act, except in so far as they authorize the appointment of a Commission on Mental Diseases, do not take effect until the appointment and qualification of the members of said commission. Accordingly, I am of the opinion that the present members of the Board of Insanity continue in office until their successors are appointed and qualified, and until the first day of August, 1916, in any event.

Section 5 of chapter 288 of the General Acts of 1916 provides: —

So much of this act as provides for the appointment of the commission hereby established shall take effect upon its passage. All other provisions thereof shall take effect upon the qualification of the members of said commission, but not earlier than July one, nineteen hundred and sixteen.

What I have said above in connection with chapter 285 of the General Acts of 1916 applies to this act, with the exception of the date.

Section 10 of chapter 296 of the General Acts of 1916 provides: —

So much of this act as provides for the appointment of the supervisor shall take effect upon its passage. All other provisions hereof shall take effect upon the qualification of the said officer but not earlier than July first in the year nineteen hundred and sixteen.

This provision is substantially the same as the provision in the acts above referred to, and therefore, in my opinion, the Commission on Economy and Efficiency continues in office in any event until the first day of July, 1916, and until the appointment and qualification of the Supervisor.

Section 10 of chapter 241 of the General Acts of 1916 provides: —

So much of this act as provides for the appointment of the advisory prison board, the board of parole and the director of prisons shall take effect upon its passage. All other provisions shall take effect on the first day of July, nineteen hundred and sixteen.

This act was approved May 20, 1916. It evidently contemplated that the Governor should appoint between the time of its passage and the first day of July, 1916, officers to administer the duties prescribed by the act. Section 1 of the act provides: —

The board of prison commissioners existing under authority of chapter two hundred and twenty-two of the Revised Laws, the offices of chairman and secretary thereof, the office of deputy commissioner established under chapter eight hundred and twenty-nine of the acts of the year nineteen hundred and thirteen, the board of parole for the state prison and the Massachusetts reformatory and the board of parole for the reformatory for women established by said chapter eight hundred and twenty-nine, are hereby abolished. All the rights, powers, duties and obligations conferred and imposed by law on said board of prison commissioners, or any member thereof, except as is hereinafter provided, are hereby transferred to and shall hereafter be exercised and performed by the director of the Massachusetts bureau of prisons established by this act, who shall be the lawful successor of said board. All the rights, powers, duties and obligations conferred and imposed by law on said boards of parole are hereby transferred to and shall hereafter be exercised and performed by the board of parole of the Massachusetts bureau of prisons established by this act, which board shall be the lawful successor of said boards.

In my opinion, upon the first day of July, 1916, the date upon which the act takes effect, the Board of Prison Commissioners, the offices of chairman and secretary thereof, the office of deputy commissioner, the Board of Parole for the State Prison and the Massachusetts Reformatory, and the Board of Parole for the Reformatory for Women, are abolished and cease to have any power under the law.

RETIREMENT — PROBATION OFFICER.

Gen. St. 1916, c. 225, does not authorize the retirement of a probation officer who, although he has been in the service for twenty consecutive years or more, has devoted his entire time to the duties of his office for only a portion of the twenty-year period.

To the
Commission
on Probation.
1916
July 6.

I beg to acknowledge your request for my opinion as to whether chapter 225 of the General Acts of 1916 applies to a probation officer who has faithfully performed his duties as such officer for at least twenty consecutive years, but whose whole time has not been given to his duties during the whole of the twenty-year period.

Section 1 of chapter 225 of the General Acts of 1916 is as follows: —

Any probation officer of any court who shall be eligible to a pension for twenty years' service under the provisions of section one of chapter seven hundred and twenty-three of the acts of the year nineteen hundred and twelve, shall hereafter be retired upon attaining the age of seventy years.

Section 1 of chapter 723 of the Acts of 1912 is as follows: —

Any probation officer or assistant probation officer whose whole time is given to the duties of his office shall, at his or her request, be retired from active service and placed upon a pension roll by the court upon which it is his duty to attend, with the approval of the county commissioners of the county in which the court is situated: *provided*, that he is certified in writing by a physician designated by such court to be permanently disabled, mentally or physically, for further service by reason of injuries or illness sustained or incurred through no fault of his in the actual performance of his duty as such officer. Any probation or assistant probation

officer whose whole time is given to his duties as such officer and who has faithfully performed his duties as such officer for not less than twenty consecutive years, and who is not less than sixty years of age, shall also be retired under the provisions of this act at his or her request without the aforesaid certification.

Section 2 then provides that every person retired under the provisions of the act shall receive an annual pension of one-half the compensation received by him at the time of his retirement.

The last sentence of section 1 of chapter 723 of the Acts of 1912 expressly authorizes the retirement at his or her request of "any probation or assistant probation officer whose whole time is given to his duties as such officer and who has faithfully performed his duties as such officer for not less than twenty consecutive years, and who is not less than sixty years of age." This provision must be interpreted as authorizing retirement only in cases where the probation or assistant probation officer in question has devoted his entire time during regular working hours to the duties of his office during the whole period of not less than twenty consecutive years. In my opinion it does not authorize retirement in cases where a probation officer has been in the service twenty consecutive years or more and has devoted his entire time to the duties of his office only during a portion of the twenty-year period.

The result is, in my opinion, that in the case stated by you the probation officer is not entitled to be retired at his request, under the provisions of section 1 of chapter 723 of the Acts of 1912, and is not subject to compulsory retirement under the provisions of chapter 225 of the General Acts of 1916.

TEACHERS — DUTY OF STATE BOARD OF EDUCATION TO ASSIST
IN PROCURING POSITIONS.

The duty imposed by St. 1911, c. 731, as amended by St. 1913, c. 368, upon the State Board of Education to assist teachers to secure positions is limited to positions within this Commonwealth.

To the
State Board
of Education.
1916
July 10.

You have requested my opinion as to whether, under the provisions of St. 1911, c. 731, as amended by St. 1913, c. 368 —

(a) Your Board is authorized, through its Teachers' Registration Bureau, to assist teachers to secure positions outside the Commonwealth as opportunity offers.

(b) In view of the fact that a larger number of teachers enroll every year in the Bureau than it can help to secure positions in Massachusetts, does the phrase in section 1, "to procure positions for them so far as may be possible," make it incumbent upon the Board to help such teachers secure positions outside the Commonwealth if opportunity offers?

St. 1911, c. 731, § 1, is as follows:—

Any graduate of any high school or normal school in this commonwealth, or of any other school considered by the board of education to be of equal grade, or the graduate of any reputable college, provided that such graduate is a person of good character and is a resident of the state, may file an application with the board of education for a position as school teacher upon the payment of a fee of two dollars. The application shall set forth the name, address, and, briefly, the experience and qualifications of the applicant. It shall be the duty of the board of education to communicate with the school committees in the cities and towns of the commonwealth, and with persons who have made application for a position as school teacher in accordance with the provisions of this section, and to procure positions for them so far as may be possible, free of expense to the applicant beyond the aforesaid fee, and without expense to the various school committees. The said board shall cause to be printed and sent to school committees of cities and towns a list of the applicants for positions as aforesaid, with a brief statement of their qualifications and experience.

The remaining sections of the act throw no light upon the questions presented.

Under this act college graduates who are residents of the State, and graduates of any high school or normal school in

this Commonwealth, or other school of equal grade, may file their applications. In general, therefore, the applicants would be residents of the Commonwealth.

It is the duty of the Board of Education "to communicate with the school committees in the cities and towns of the commonwealth" and with persons who have filed applications, and "to procure positions for them so far as may be possible, free of expense to the applicant . . . and without expense to the various school committees." It would seem evident that the committees referred to in the last words quoted are the same school committees mentioned earlier in the sentence, to wit, committees in the cities and towns of the Commonwealth.

While the question is not entirely free from doubt, I am of the opinion that the duty "to procure positions" was intended to be limited to procuring such positions through the school committees in the cities and towns of the Commonwealth, with whom it is made the duty of the Board to communicate. Unless such is the correct interpretation, the provision with reference to communication with the "school committees in the cities and towns of the Commonwealth" becomes surplusage, because if the requirement of procuring positions meant positions anywhere, either within or without the Commonwealth, communication with the various school committees within the Commonwealth would follow as an incident.

It remains to be considered how far the amendment of 1913 affects this construction.

By that act the section quoted above is amended by striking out the words "and is a resident of the state," in the seventh and eighth lines of the quotation above. The effect of this amendment is to permit college graduates to register with the Board, regardless of whether or not they are residents of the Commonwealth. This act was adopted upon the report of the Board of Education to the Legislature, which was printed in 1913 as House Document No. 180, and was reported by the committee to which was referred the recommendations for legislation contained in said report. In this report appears the following:—

Note to No. 3.—The purpose of this act is to increase the efficiency of the service of the Board in helping teachers who are seeking positions, and in aiding superintendents and school committees who are seeking teachers to fill vacancies.

The Board gives such service only to school committees and superintendents within the State, but wishes to secure as large a list as possible of available teachers from both within and without the State.

In view of this history, I am of the opinion that the 1913 amendment did not enlarge the powers of the State Board of Education with reference to the places in which positions were to be procured.

Accordingly, I am of the opinion that both of your questions should be answered in the negative.

FIRE PREVENTION COMMISSIONER — REGULATION OF USE OF GASOLINE IN POWER BOATS — FEDERAL JURISDICTION.

While the Fire Prevention Commissioner is authorized by St. 1914, c. 795, to make regulations relative to the use of gasoline on motor boats, this authority does not extend to boats used exclusively on the navigable waters of the United States, as the regulation of boats on such waters is within the power of Congress, and Congress has made regulations governing this subject.

I beg to acknowledge your letter in which you ask me the following question: —

Does section 2 of chapter 370 of the Acts of 1904, as amended by chapter 280 of the Acts of 1905, vest in the Fire Prevention Commissioner for the Metropolitan District, through chapter 795 of the Acts of 1914, the right to make regulations governing the use of gasoline in power boats within the waters of the metropolitan fire prevention district?

St. 1905, c. 280, § 1, which amends St. 1904, c. 370, §§ 1 and 2, provides, in part, as follows: —

Section 1. The powers and duties heretofore conferred and imposed upon cities and towns and the mayors and aldermen, city councils and selectmen thereof, by chapter one hundred and two of the Revised Laws, to regulate the keeping, storage, use, manufacture, sale, handling, transportation or other disposition of . . . crude petroleum or any of its products, or explosive or inflammable fluids or compounds, tablets, torpedoes or any explosives of a like nature, or any other explosives, . . .

To the Fire
Prevention
Commissioner.
1916
July 17.

are hereby conferred and imposed upon the detective and fire inspection department of the district police, except as to the transportation of said explosives by steam railroads. *Section 2.* The detective and fire inspection department of the district police may make regulations, except as hereinbefore provided, for the keeping, storage, use, manufacture, sale, handling, transportation or other disposition of . . . crude petroleum or any of its products, or explosive or inflammable fluids or compounds, . . . and may prescribe the materials and construction of buildings to be used for any of the said purposes.

St. 1914, c. 795, §§ 2, 3 and 13, are, in part, as follows: —

SECTION 2. The governor, with the advice and consent of the council, shall appoint a citizen of the commonwealth who shall have resided within the metropolitan district for at least three years, to be called the fire prevention commissioner for the metropolitan district. . . .

SECTION 3. All existing powers, in whatever officers, councils, bodies, boards or persons, other than the general court and the judicial courts of the commonwealth, they may be vested, to license persons or premises, or to grant permits for or to inspect or regulate or restrain the keeping, storage, use, manufacture, sale, handling, transportation or other disposition of . . . camphine or any similar fluids or compounds, crude petroleum or any of its products, or any explosive or inflammable fluids or compounds, . . . are hereby transferred to and vested in the commissioner.

SECTION 13. In addition to the powers given by sections one to twelve, inclusive, the commissioner shall have power to make orders and rules relating to fires, fire protection and fire hazard binding throughout the metropolitan district, or any part of it, or binding upon any person or class of persons within said district, limited, however to the following subjects: —

.

E. Ordering the remedying of any condition found to exist in or about any building or other premises, or any ship or vessel in violation of any law, ordinance, by-law, rule or order in respect to fires and the prevention of fire.

I am inclined to the opinion that these provisions of law vest in the Fire Prevention Commissioner authority to make reasonable regulations governing the use of gasoline within the metropolitan fire prevention district, whether such use is upon land or upon water. It should be observed, however, that the Congress of the United States has provided that —

Every motor boat and also every vessel propelled by machinery other than by steam, more than sixty-five feet in length, shall carry ready for immediate use the means of promptly and effectually extinguishing burning gasoline (§ 8283) —

and that the Secretary of Commerce and Labor shall make such regulations as may be necessary to secure the proper execution of this provision. See U. S. Comp. Stat., 1913, §§ 8283 to 8285, inclusive. Again, by section 8281 of the Compiled Statutes, it is provided that —

Every motor boat subject to any of the provisions of this act, and also all vessels propelled by machinery other than by steam more than sixty-five feet in length, shall carry either life-preservers or life belts, or buoyant cushions, or ring buoys or other device, to be prescribed by the Secretary of Commerce and Labor, sufficient to sustain afloat every person on board and so placed as to be readily accessible. All motor boats carrying passengers for hire shall carry one life-preserver of the sort prescribed by the regulations of the board of supervising inspectors for every passenger carried, and no such boat while so carrying passengers for hire shall be operated or navigated except in charge of a person duly licensed for such service by the local board of inspectors.

Where Congress, in the exercise of its power to regulate interstate commerce, has dealt with a subject, it excludes the power of a State to make regulations in relation to that subject. *Southern Ry. Co. v. Railroad Commissioners of Indiana*, 236 U. S. 439; *Commonwealth v. Breakwater Co.*, 214 Mass. 10.

Furthermore, it seems that Congress has the power under the commerce clause to make regulations relative to the safety of boats and passengers thereon while such boats are using the navigable waters of the United States, although not engaged in interstate commerce. *The Scow No. 1*, 169 Fed. Rep. 717.

While I am of the opinion that you are authorized, under the provisions of section 2 of chapter 370 of the Acts of 1904, as amended by chapter 280 of the Acts of 1905, to make regulations relative to the use of gasoline upon motor boats, yet, so far as such boats are used exclusively upon the navigable

waters of the United States, regulations upon any subject as to which regulations have been made by or under authority of Congress may be held of no effect, as in conflict with Federal authority.

MILITIA — SALARIES OF EMPLOYEES OF COMMONWEALTH MUSTERED INTO FEDERAL SERVICE.

Under Gen. St. 1916, c. 126, State employees serving in the militia may be paid their ordinary salaries only while performing duty under St. 1908, c. 604, and when mustered into the service of the United States and sent out of the Commonwealth the payment of salaries to them as employees of the Commonwealth must cease by virtue of R. L., c. 6, § 58.

You have requested my opinion as to whether you have authority to pay the salaries of men in your employ who were members of the Massachusetts Volunteer Militia and who are now in the service of the United States on the Mexican border.

To the
Trustees of
the State In-
firmmary and
State Farm.
1916
July 20.

R. L., c. 6, § 58, provides, in part, as follows: —

. . . No salary shall be paid to any person for a longer period than that during which he has been actually employed in the duties of his office. . . .

It is plain that in the absence of express statutory authority your board has no authority to pay salaries to its employees under the conditions mentioned by you. The only statute dealing with this subject-matter of which I am aware is Gen. St. 1916, c. 126, which is as follows: —

Any person in the service of the commonwealth shall be entitled, during the time of his service in the organized militia under the provisions of sections one hundred and forty-one, one hundred and forty-two, one hundred and fifty-one, one hundred and fifty-two and one hundred and sixty of chapter six hundred and four of the acts of the year nineteen hundred and eight, and acts in amendment thereof and in addition thereto, to receive pay therefor, without loss of his ordinary remuneration as an employee or official of the commonwealth, and shall also be entitled to the same leaves of absence or vacation with pay given to other like employees or officials.

This statute authorizes the payment of salaries to State employees who are members of the militia only when they are on duty under the above-mentioned sections of St. 1908, c. 604.

Section 141 of that statute provides for the calling out of the militia to repel an invasion or to suppress an insurrection. Obviously, this applies to invasions or insurrections in the Commonwealth. Section 142 covers strike and riot duty; section 151 provides for an annual parade; and section 152, for annual camp duty. Section 160 is as follows:—

The commander-in-chief may order out any part of the militia for escort and other duties, and may authorize the use of mounted bands.

I am informed that when the militia was first ordered to Framingham it was ordered there for a period of eight days under the last-mentioned section. Some individuals may have been ordered there for longer than that period. Accordingly, while militiamen, employees of the Commonwealth, were serving in camp in Framingham, or elsewhere, under an order given by virtue of section 160, they would be entitled to receive their salaries from the Commonwealth under Gen. St. 1916, c. 126. When, however, their duty under that order ceased, and they were mustered into the service of the United States and sent out of the Commonwealth in connection with that service, it can no longer be said that they are performing duties under section 160, or any other of the sections mentioned in chapter 126. Accordingly, from the time their duty under section 160 ceased, or, as I am informed, in most instances at the end of a period of eight days from the time when they were called into service, there is, in my opinion, no authority for the payment to them of salaries as employees of the Commonwealth.

FIRE PREVENTION COMMISSIONER — AUTOMATIC SPRINKLERS —
AUTHORITY TO ORDER INSTALLATION.

Buildings in the metropolitan district used as stores which deal in and sell certain commodities mentioned in St. 1914, c. 795, § 10, are used "for the business of keeping" such commodities, and if four or more persons live above the second story of such buildings the Fire Prevention Commissioner has authority to order automatic sprinklers installed therein.

You request my opinion upon the question of whether you have the power to order automatic sprinklers installed in buildings in the metropolitan district used in whole or in part as stores which deal in and sell certain commodities mentioned in St. 1914, c. 795, § 10, and in which buildings four or more persons live above the second story.

To the Fire
Prevention
Commissioner.
1916
August 3.

That section reads as follows:—

Any building within the metropolitan district used in whole or in part for the business of woodworking, or for the business of manufacturing or working upon wooden, basket, rattan or cane goods or articles, or tow, shavings, excelsior, oakum, rope, twine, string, thread, bagging, paper, paper stock, cardboard, rags, cotton or linen, or cotton or linen garments or goods, or rubber, feathers, paint, grease, soap, oil, varnish, petroleum, gasoline, kerosene, benzine, naphtha, or other inflammable fluids, and any building in the metropolitan district used in whole or in part for the business of keeping or storing any of such goods or articles, except in such small quantities as are usual for domestic use, or for use in connection with and as incident to some business other than such keeping or storing, shall, upon the order of the commissioner, be equipped with automatic sprinklers; *provided, however*, that no such order shall apply to any building unless four or more persons live or are usually employed therein above the second floor.

In my opinion the word "keeping," as used in this section, is broader than "storing," and includes keeping for sale. It is not less a "keeping" because the keeper intends to sell. Indeed, under the word "keep" in the Century Dictionary is found this definition, "to have habitually in stock or for sale."

It follows from this that such a case does not fall within the exception contained in the latter part of this section, namely, "except . . . for use in connection with and as incident to

some business other than such keeping or storing." This exception would seem to be intended to cover such cases as where oil, for example, is kept to lubricate machinery in a factory manufacturing articles not specified in this section, or paper or twine which is kept to wrap merchandise in a store not dealing in said articles.

I am fortified in this opinion by the fact that the law in question would be practically emasculated by a different interpretation, as its operation would be restricted to storage warehouses in which rarely, if ever, four or more persons are employed above the second story.

INSANE HOSPITALS — POWER TO DISCHARGE FROM — SUPPORT OF INMATES OF FEEBLE-MINDED SCHOOLS.

Under St. 1909, c. 504, § 76, the superintendent of a State hospital for the insane, when authorized by the trustees of such hospital or of the State Board of Insanity, may discharge any person committed to such hospital for observation under section 43 unless some limitation to the contrary has been placed on the commitment by the judge.

The trustees of such an institution may receive into its schools feeble-minded persons without certification, as provided by St. 1909, c. 504, § 64, as amended by Gen. St. 1916, c. 122, § 2, and without liability for their support, as provided by St. 1909, c. 504, § 82.

To the Commission on Mental Diseases.
1916
September 12.

The State Board of Insanity requested my opinion on the following questions, as to which I am informed answers are desired by the present commission.

1. Has the superintendent of a State hospital for the insane or the Commission on Mental Diseases ordinary powers of discharge with reference to persons committed for observation under the provisions of St. 1909, c. 504, § 43?

That section is as follows: —

If a person is found by two physicians, qualified as provided in section thirty-two, to be in such mental condition that his commitment to a hospital for the insane is necessary for his proper care or observation, he may be committed by any of the judges mentioned in section twenty-nine to a state hospital for the insane or to the McLean Hospital, under such limitations as the judge may direct, pending the determination of his insanity.

Section 76 of said chapter provides: —

The superintendent or manager of a private institution or receptacle described in section seven, the superintendent of such a state institution and of the McLean Hospital, when authorized thereto by the board of trustees of such institution, or the trustees, or the state board of insanity, or on an application in writing, a judge of probate for the county in which the institution is situated, or in which the inmate had his residence at the time of his commitment or admission, or a justice of the supreme judicial court in any county, after such notice as the said superintendent, manager, trustees, state board, judge or justice may consider reasonable and proper, may discharge any inmate if it appears that he will be sufficiently provided for by himself, his guardian, relatives or friends, or that his detention therein is no longer necessary for his own welfare or the safety of the public. If the legal or natural guardian or any relative of an inmate opposes such discharge, it shall not be made by a superintendent, manager or board of trustees without written notice having been given to the person opposing such discharge. The provisions of this section shall not apply to persons committed by a court.

The provisions of section 76 are unlimited in terms except for the last sentence, — “The provisions of this section shall not apply to persons committed by a court.” It is to be noted that ordinary commitments provided for in section 29 of said chapter are made by certain specified judges rather than by the court. Persons under indictment or acquitted of murder by reason of insanity are committed under the provisions of sections 103 and 104 by “the court.” While in most cases the action by a judge would be action by the court, in view of the language of these sections I am of the opinion that the last sentence of section 76, quoted above, does not relate to ordinary commitments made under section 29.

This being so, there seems to be no more reason for excluding from the operation of section 76 commitments made for the purpose of observation, under section 43, than for more permanent commitments made under section 29. It is to be observed that the commitments under section 43 may be made “under such limitations as the judge may direct,” and that if the committing judge should in his order place some limitation upon the time within which discharge was to be granted,

in my opinion such limitation should be complied with; but apart from any such limitation, I am of the opinion that the powers of the superintendent and of the Commission on Mental Diseases, under section 76, apply to commitments made under section 43.

2. Have the trustees of the Massachusetts School for the Feeble-Minded and the Wrentham State School authority to receive persons into the schools without certification as feeble-minded persons, as provided in section 64 of chapter 504 of the Acts of 1909, and may such persons be received without liability for support, as provided by section 82 of said chapter?

Section 64, as amended by section 2 of chapter 122 of the General Acts of 1916, is as follows:—

The trustees of said institutions may at their discretion receive, maintain and educate in the school department, any feeble-minded person from this commonwealth, gratuitously or otherwise, upon application being made therefor by the parent or guardian of such person, which application shall be accompanied by the certificate of a physician, qualified as provided in section thirty-two, that such person is deficient in mental ability, and that in the opinion of the physician he is a fit subject for said school. A physician who makes the said certificate shall have examined the alleged feeble-minded person within five days of his signing and making oath to the certificate, and such medical certificate shall be void if the person certified to be feeble-minded shall not be received at the school to which he is committed within thirty days after the date thereof. Special pupils may be received from any other state or province at a charge of not less than three hundred dollars a year. The trustees may also at their discretion receive, maintain and educate in the school department other feeble-minded persons, gratuitously or upon such terms as they may determine.

Said section 82 provides:—

The price for the support of inmates, other than state charges, of the institutions mentioned in section fourteen, and of the Massachusetts School for the Feeble-Minded, shall be determined by the trustees of the respective institutions. The price for the support of state charges shall be determined by the state board of insanity at a sum not exceeding five dollars per week for each person, and may be recovered by the treasurer and receiver general from such persons if of sufficient ability, or from any

person or kindred bound by law to maintain them. The attorney-general shall upon request of the said board bring action therefor in the name of the treasurer and receiver general.

It is to be noted that until the codification of the laws relating to insane persons, made by St. 1909, c. 504, the right of recovery for the support of inmates of the Massachusetts School for the Feeble-Minded was limited to inmates "in the custodial department" (R. L., c. 87, § 120), while the provision as to admission of inmates (§ 117) contained the same sentence as the present law,— "The trustees may also at their discretion receive, maintain and educate in the school department other feeble-minded persons, gratuitously or upon such terms as they may determine."

Although the provisions of section 82 are quite general in their nature, it is obvious that if the State is to recover payment for all persons supported at its expense the maintenance and education of any person will not be gratuitous, and yet it is expressly provided that the trustees may at their discretion maintain and educate other feeble-minded persons gratuitously or upon such terms as they may determine. Inasmuch as this provision was allowed to remain in the statute, I am of the opinion that it was the intention of the Legislature to permit such action by the trustees to continue without subjecting persons to the liability prescribed by section 82, if they should see fit to do so. The trustees, in my opinion, may determine to admit such persons gratuitously or as State charges or upon agreement with certain persons for payment of certain amounts, or any other terms they may determine upon.

Accordingly, I am of opinion that this question is to be answered in the affirmative.

INSPECTION OF BOILERS — COLLECTION OF FEE.

The fee imposed by St. 1907, c. 465, § 14, as amended by St. 1912, c. 531, § 5, for the inspection of boilers, may be recovered in an action of contract brought by the inspector against the owner or user of such boiler.

To the Chief
of the Massa-
chusetts Dis-
trict Police.
1916
September 15.

You request my opinion upon the question of what process, if any, may be used to collect the fee provided by law for inspection of boilers. St. 1907, c. 465, § 14, as amended by St. 1912, c. 531, § 5, provides as follows:—

The owner or user of a boiler inspected by the boiler inspection department shall pay to the inspector five dollars for each boiler internally and externally inspected, and two dollars for each visit for external inspection under steam, and two dollars for each cast-iron sectional boiler inspected. . . .

Section 28 of said act provides for prosecution of persons violating any of the provisions of this act and for punishment by fine or imprisonment, but no provision is made in the act for the recovery of the fee itself.

The law is well settled that when a duty is imposed upon a person by statute there is an implied promise on the part of such person to perform that duty. *Bath v. Freeport*, 5 Mass. 325. I am of the opinion, therefore, that since the statute does not point out any particular remedy to be pursued for the recovery of this fee, it may be recovered in an action of contract brought by the inspector against the owner or user of the boiler or boilers inspected.

WORKMEN'S COMPENSATION ACT — APPLICABILITY TO COMMONWEALTH.

Laborers, workmen and mechanics in the employ of the Commonwealth are not deprived of the benefits of the workmen's compensation act by Gen. St. 1916, c. 307.

To the
Metropolitan
Water and
Sewerage
Board.
1916
September 15.

You request my opinion upon the question of whether or not laborers, workmen and mechanics in the employ of the Commonwealth are deprived of the benefits of the workmen's

compensation act by Gen. St. 1916, c. 307. Chapter 307 is as follows: —

SECTION 1. Section seven of chapter eight hundred and seven of the acts of the year nineteen hundred and thirteen is hereby amended by inserting after the word "persons", in the fourth line, the words: — in public employments,— so as to read as follows: — *Section 7.* The provisions of chapter seven hundred and fifty-one of the acts of the year nineteen hundred and eleven, and acts in amendment thereof and in addition thereto, shall not apply to any persons in public employments other than laborers, workmen and mechanics employed by counties, cities, towns, or districts having the power of taxation.

SECTION 2. This act shall take effect upon its passage.

It is significant to note that the omission of the Commonwealth was not a variation of St. 1913, c. 807, as the original act, in section 7, made the same omission, so that the answer to your question depends upon the interpretation of St. 1913, c. 807, § 7.

Our courts have laid down the rule that if the general meaning and object of a statute should be inconsistent with the literal import of any particular clause or section, such clause or section must, if possible, be construed according to the spirit of the act, and that it is proper to consider the whole of a statute and the probable intention of the Legislature in order to ascertain the meaning of any particular section; and this mode of interpretation is justifiable even where the words of the section itself are unambiguous. *Holbrook v. Holbrook*, 1 Pick. 248.

St. 1913, c. 807, § 1, provides that the Commonwealth shall, and any county, city, town or district having the power of taxation may, pay to laborers, workmen and mechanics the compensation which had theretofore been provided as to private employments. Sections 2 and 5 of this act also provide for procedure as to the Commonwealth. Section 6 provides that this act shall apply to all laborers, workmen and mechanics in the service of the Commonwealth, or of a county, city, town or district having the power of taxation. To hold that the provisions of section 7 of this act exclude the Common-

wealth from the operation of this chapter would create a repugnancy in the act itself which the Legislature could not have intended.

The amendment of this section by Gen. St. 1916, c. 307, above quoted, does not, in my opinion, change the meaning of the act as applied to the Commonwealth. The amendment consisted merely in the insertion of the words "in public employments," and was undoubtedly intended only to remove any possible question as to whether the general compensation act had been repealed by section 7 of said chapter 807.

Accordingly, I am of the opinion that the answer to your question must be in the negative.

CAPE COD CANAL — JURISDICTION OF JOINT BOARD — PUBLIC SERVICE COMMISSION — SAFETY APPLIANCES — COMPLETION OF CANAL.

The jurisdiction of the Joint Board created by St. 1899, c. 448, § 6, to order the erection or installation of structures and appliances for the protection and use of the Cape Cod Canal, whatever its extent, was not a continuing one, but ended upon the original approval by it, as provided in that section, of the plans for the construction of the canal. St. 1910, c. 519, gave no additional authority in that regard.

The Public Service Commission, under the provisions of St. 1913, c. 784, now has exclusive jurisdiction of the regulation of the operation of the canal, and it alone is authorized to determine the equipment and appliances required for its safe operation.

Under the clause of the contract for the construction of the Cape Cod Canal, providing for the construction of tidal gates by the contractor "if at the expiration of one year after the canal is opened to the public use" the Joint Board is satisfied that such gates should be constructed for the safe and suitable use of the canal, the Joint Board is authorized to make its determination within a reasonable time after the canal has been constructed to its full size and opened to public use for one year.

The Joint Board may issue its final certificate of the completion of the canal under St. 1900, c. 476, § 1, in the event that variations have been made in its construction from the plans originally approved by the Harbor and Land Commissioners under St. 1899, c. 448, § 4, only in case that it finds as a matter of fact that such changes are merely incidental and not matters of substance, or are required by the establishment of points of crossing under the provisions of section 6 of that statute, and that they do not change the general scheme or character of the canal approved by the Harbor and Land Commissioners.

The regulation of the use of the draw in the railroad bridge over the canal is now entirely within the jurisdiction of the Public Service Commission, and the regulation of the use of the draw in the highway bridges is within the jurisdiction of the county commissioners of the county of Barnstable.

I beg to acknowledge the request of the Joint Board for my opinion concerning certain questions which have arisen in regard to the construction and the operation of the Cape Cod Canal. Since the date of your request the Board of Harbor and Land Commissioners has been abolished by chapter 288 of the General Acts of 1916, and its duties and powers transferred to the Commission on Waterways and Public Lands. Consequently, references made in this opinion to the Harbor and Land Commissioners must be interpreted as references to the new commission so far as future action is concerned.

To the
Joint Board
consisting of
the Public
Service Com-
missioners and
the Harbor
and Land Com-
missioners.
1916
September 19.

In an opinion which I addressed to your Board on July 22, 1915, I stated with some fullness certain important provisions of the statutes under which this canal is being constructed, and certain important provisions in the contract between the Boston, Cape Cod & New York Canal Company, hereafter referred to as the "Canal Company," and the Cape Cod Construction Company, hereafter referred to as the "Construction Company." I refer you to this discussion without now repeating it. Your questions, however, require that certain provisions of the statutes with reference to the jurisdiction of your Board and that of other boards concerned with the canal should be stated more fully.

Chapter 448 of the Acts of 1899, as amended by chapter 476 of the Acts of 1900, committed to the determination of the Joint Board two general questions. The first of those questions was purely a financial one. At the time of the enactment of the statute of 1899 there appears to have been no board or other tribunal in the Commonwealth which had jurisdiction over canal companies similar to that then exercised by the Railroad Commissioners over railroads and railways. Accordingly, by section 2 of that statute the Joint Board created by section 6 of the statute was given a similar control over the issue of stock and bonds by the Canal Com-

pany to that which the Railroad Commissioners then exercised over the issue of stock and bonds by railroads and railways. The obvious purpose of this provision was to prevent the issue of securities by the Canal Company to an unreasonable or excessive amount or without adequate property behind them. By the amendment to this section, made by section 1 of chapter 476 of the Acts of 1900, the supervision over the issue of stock and bonds by the Canal Company given to the Joint Board was extended, and it was provided that, if the Canal Company entered into a contract to pay for the construction of the canal by the issue of its stock and bonds, such a contract should be subject to the approval of the Joint Board, and that the company should issue stock and bonds from time to time under such contract only upon the certification of the Joint Board that the work and materials for which such securities were being issued had actually been done or furnished in accordance with the contract.

These provisions of the statute give to the Joint Board no authority whatever over the manner in which the canal is to be constructed or equipped. The Canal Company is authorized by the statute, as pointed out in the previous opinion, to construct the canal in accordance with plans approved by the Harbor and Land Commissioners. The only authority of the Joint Board, under the provisions of section 2, is, first, to approve the form of contract in case a contract is made by which stock and bonds are to be issued in payment for the construction of the canal, and then to determine from time to time, as the work progresses, whether the Canal Company may issue stock and bonds in payment for a given *pro rata* amount of the work provided for in the contract.

Section 6 of the act of 1899 is as follows: —

The canal company, within one month after the approval of its plans by the board of harbor and land commissioners, may apply to the boards of railroad commissioners and of harbor and land commissioners, who for the purposes hereinafter stated are constituted a joint board, to determine at what point or points the railroad of the Old Colony Railroad Company shall cross said canal by a drawbridge or bridges, or by a tunnel or tunnels

constructed under said canal. Said joint board thereupon, after notice to the Old Colony Railroad Company and to all other parties interested, which notice shall be given in such form as said joint board shall direct, shall determine said questions, and the decision of a majority of said joint board shall be final. Said canal company shall construct its canal with such structures and appliances for its protection and use as said joint board may order, together with such bridge or bridges, tunnel or tunnels, ferries, and changes of highways, under the supervision of said joint board, as shall be in accordance with plans approved by them and in conformity with such orders as they may make; and the supreme judicial court shall have jurisdiction in equity to enforce such orders.

Plainly, the first part of this section commits to the determination of the Joint Board but one question, namely, at what point or points shall the railroad of the Old Colony Railroad Company cross the canal, and what shall be the form of crossing. Before making this determination the Joint Board, on March 14, 1901, requested the opinion of Attorney-General Knowlton as to whether, in view of the fact that the Harbor and Land Commissioners had approved plans for the construction of a canal without requiring locks or tidal gates, the Joint Board then had authority to require the erection of such locks or tidal gates for the protection and use of the canal. On April 6, 1901 (II. Op. Atty.-Gen. 257), he in substance advised the Joint Board that the only question referred to that Board by section 6 concerned the points at which and the manner in which the railroad should cross the canal, and that it had no jurisdiction over matters of the construction of the canal, such as the question of locks, except so far as such matters should be incidental to the protection and maintenance of the crossings which came within the jurisdiction of the Board.

In *Bourne v. Joint Board of Commissioners*, 221 Mass. 293, the Supreme Judicial Court held that the general provisions of section 6 must be read into and in connection with section 14 of the same statute, and that therefore after the county commissioners for the county of Barnstable, under section 14, had designated the points at which public highways should cross the canal, the Joint Board was authorized to determine

in each instance whether such crossing should be by bridge, tunnel or ferry. It was expressly decided that the establishment of a temporary ferry was within the power of the Joint Board.

Section 1 of chapter 519 of the Acts of 1910 is as follows:—

The joint board mentioned in chapter four hundred and forty-eight of the acts of the year eighteen hundred and ninety-nine, entitled "An Act to incorporate the Boston, Cape Cod and New York Canal Company," shall have power from time to time, upon such terms as shall seem proper, to change the point or points, as previously determined by the joint board, at which the railroad of the Old Colony Railroad Company shall cross the said canal as provided in section six of the said act, and to vary any previous order of the joint board determining the said point or points; and when said joint board has considered and determined a method of crossing the canal suitable for railroad or highway traffic at certain designated points as provided in said act, the power and authority of said joint board shall not thereby be limited or exhausted, and it may thereafter under the provisions of said act consider and determine the method of crossing at other points of crossing for highway traffic, in the method provided in said act.

It is to be noted that this section applies only to the determination of the point or points at which the railroad shall cross the canal, and to the determination of the method of the crossing of the canal by highways. It in no way refers to any authority in the Joint Board to require structures or appliances for the protection or use of the canal.

I do not deem it necessary for me now to review the opinion given by Attorney-General Knowlton, or to determine whether, in connection with its original action under section 6, the Joint Board would have had authority to require the erection of locks or tidal gates or any other appliances for the protection and use of the canal aside from the protection of the crossings. In my opinion, until the enactment of the statute of 1910 just quoted, the authority given the Joint Board by section 6 was not a continuing one, and its duty under that section was entirely completed when it first approved the plans in accordance with the provisions of that section. With that approval, and until the enactment of the statute

of 1910 extending its jurisdiction, in my opinion the Joint Board had no further authority under section 6. As already stated, the statute of 1910 gave to the Board no authority to order structures and appliances for the protection and use of the canal.

Any uncertainty that may exist as to the extent of the jurisdiction of the Joint Board to order structures and appliances under section 6 is made immaterial, so far as present conditions are concerned, by the provisions of chapter 784 of the Acts of 1913 establishing the Public Service Commission and creating its jurisdiction. Section 2 of that statute gave to this commission "general supervision and regulation of, and jurisdiction and control over, the following services, when furnished or rendered for public use within the commonwealth, and all persons, firms, corporations, associations and joint stock associations or companies, hereinafter in this act collectively called common carriers and severally called a common carrier, furnishing or rendering any such service or services. . . ." Among the services specified was the following:—

The operation of all conveniences, appliances, facilities or equipment utilized in connection with, or appertaining to, such transportation or carriage of persons or property or such express service or car service, by whomsoever owned or by whomsoever provided, whether the service be common carriage or merely in facilitation of common carriage.

Section 23 provides, in part, as follows:—

Whenever the commission shall be of opinion, after a hearing had upon its own motion or upon complaint, that the regulations, practices, equipment, appliances or service of any common carrier, now or hereafter subject to its jurisdiction, are unjust, unreasonable, unsafe, improper or inadequate, the commission shall determine the just, reasonable, safe, adequate and proper regulations and practices, thereafter to be in force and to be observed, and the equipment, appliances and service thereafter to be used and shall fix and prescribe the same by order to be served upon every common carrier to be bound thereby.

Section 29, with certain exceptions not now material, repealed "all acts and parts of acts inconsistent with any provision of

this act, and all acts and parts of acts which would in any way limit or prevent the exercise to the fullest extent of any of the jurisdiction, powers, authority or discretion delegated herein to the commission." In my opinion these provisions of the Public Service Commission act give to that commission exclusive jurisdiction over the operation of the canal, and authorize it alone to determine the nature and character of the equipment and appliances now required for the safe operation of the canal.

In the foregoing discussion I have stated all the matters which have been committed to the jurisdiction of the Joint Board by the statutes of the Commonwealth. One further matter must be noted. The specifications of the contract between the Construction Company and the Canal Company approved by the Joint Board contained the following provision: —

If at the expiration of one year after the canal is opened to public use it shall have been proved to the satisfaction of the Joint Board that a lock, tidal gates or some other device for controlling the current in the canal should be constructed in order to provide for the safe and suitable use of the canal by the public, then the contractor shall construct such lock, tidal gates or other device satisfactory to the Joint Board, and the same shall be considered as additional work and be subject to the provisions of the fifth paragraph of the contract as regards payment therefor.

As I stated in my previous opinion to your Board, doubtless by approving a contract containing this provision the Board accepted the duty thereby imposed upon it, or, in any event, it is proper for the Board, in the public interest, to undertake the performance of such duty. It is to be noted, however, that in performing this duty the Board is not acting under any statute, and has no authority by law to enforce its decision. It is merely appointed by the contract an arbitrator between the parties, and stands in reference to the parties in much the same relation as does an engineer or an architect in the ordinary construction contract. If, acting under this provision, the Board determines tidal gates or similar devices to be necessary, the Construction Company has the right to

erect them, under the provisions of the contract, and then will be entitled to receive pay therefor from the Canal Company as additional work. If the Construction Company declines to erect them, the Canal Company will have a right of action against it for breach of contract. In the event, however, that the Construction Company and the Canal Company by mutual agreement should determine that this provision of the contract need not be performed, I know of no provision of law by which the Joint Board could compel its performance.

With this discussion I proceed to deal with your specific questions.

1. Your first question in substance requests me to interpret that portion of the language of the specifications with reference to locks or tidal gates which reads as follows: "If at the expiration of one year after the canal is opened to public use."

In my opinion this provision contemplates that after the canal has been constructed to the depth and width required by the contract and by section 3 of the act of 1899, and as thus constructed has been opened to public use for a period of one year, the Joint Board is then authorized to undertake the investigation and determination of the question of the advisability of tidal gates. In my opinion it is not necessary that every part of the work covered by the contract for the construction of the canal must be completed before the year begins to run. It is merely required that the canal be constructed to its full size, and that it be given a trial by public use for one year before this question shall be determined. Accordingly, in my opinion, the Joint Board cannot determine that the canal was legally "opened to public use," within the meaning of this provision, before it had been constructed to the depth and width required by the statute, but it may determine, and on the facts stated to me should determine, that the canal was thus opened to public use before the Board has certified to its entire completion. In my opinion the words "at the expiration of one year" are used to postpone this determination until after the expiration of a year of use. To limit the time of action by the Joint Board under this

provision of the specifications to precisely the last day of the year, as is suggested by your question as a possibility, is, in my opinion, to give to this provision of the specifications an absurd construction which would practically nullify it. A failure to make a determination within a reasonable time after the expiration of the year would be tantamount to a determination that a lock or other device was unnecessary.

2. Your second question is as follows:—

Can the Joint Board under the statutes relating to the Cape Cod Canal, and under the contract between the Canal Company and the Construction Company, require the building of a lock in the canal, if determined by the Joint Board to be necessary for the “safe and suitable use of the canal by the public,” or for the “protection and use” of the canal or of the railroad and highway bridges crossing it?

As I have already pointed out, the Joint Board no longer has, if it ever did have, any jurisdiction to require the Canal Company to erect structures or appliances for the safe and suitable use of the canal by the public or for the protection and use of the canal. Jurisdiction over this matter, in my opinion, now rests with the Public Service Commission. I interpret your question, so far as it refers to railway and highway bridges crossing the canal, to refer only to bridges now existing. In my opinion your Board fully exercised all jurisdiction committed to it by section 6 of the act of 1899, with reference to these bridges, when it approved the plans for the construction of the canal and the location and character of these crossings under the provisions of that section. Accordingly, as I interpret your question I answer it in the negative.

3. Your third question is as follows:—

Can either the Joint Board or the Board of Harbor and Land Commissioners, under the statutes relating to the Cape Cod Canal, and under the contract between the Canal Company and the Construction Company, either with or without the consent of the Canal Company—

(a) Allow or require the elimination of passing places in the canal, called for by the plans of the construction thereof approved by the Board of Harbor and Land Commissioners and accepted by the Canal Company

and called for by the contract and specifications between the Canal Company and the Construction Company approved by the Joint Board?

(b) Or allow or require the relocation and construction of such passing places?

(c) Or accept or require in lieu of a strict conformity with the plans for such passing places an enlargement by the Canal Company and Construction Company of the cross-section of the canal representing an equivalent amount of dredging and material excavated?

If so, what action in either case by either or both boards is necessary or advisable for that purpose?

The statutes under consideration contain no provisions for the changing of the contract or the plans for the construction of a canal after they have once been approved. The contract itself contains the provisions for the performance of work in addition to that expressly specified, but makes no provision for the omission of any of the work described by the plans and specifications. These plans and specifications were approved by the Harbor and Land Commissioners and accepted by the Canal Company. It thereupon was authorized to construct a canal in accordance therewith. It entered upon that work, and therefore it became its duty to construct the canal in substantial compliance with those plans and specifications. The only duty imposed upon the Joint Board by the statutes and by the contract is to determine upon requisitions approved by the engineer whether the work covered by such requisitions "has been done, and such materials furnished in accordance with the contract," and so to certify. (Contract, paragraph 3.)

Paragraph 13 of the contract recognizes that "in a work of this magnitude it is impossible either to show in advance all details or to forecast precisely all exigencies." Accordingly, it is declared that "the said specifications and plans are to be taken, therefore, as indicating the kind of work, its nature and method of construction, so far as the same are now distinctly apprehended." It was then provided, in substance, that the obligation of the contractor was to complete the construction and equipment of the canal according to best rules and usages of canal construction, even though not expressly specified.

These provisions seem to me to contemplate that there may arise from time to time, during the work of constructing the canal, occasion to make various incidental changes in the details of the work to be performed. These changes, however, are not to be substantial changes in the general plan of the canal as approved by the Harbor and Land Commissioners, and are not to change the general scheme which that Board has approved. Such incidental changes are matters of perfecting the canal as planned and approved, and do not contemplate the reducing of the amount of work covered by the contract or the elimination of any substantial features of the work.

Furthermore, certain changes in the original plans as approved by the Harbor and Land Commissioners may be incidental to or required by the location and the form of the crossings of the canal by the railroad and the highways. The determination of these matters is committed by the statute to the Joint Board in the case of the railroad crossings, to the county commissioners as to location, and to the Joint Board as to form in the case of the highway crossings. In my opinion, the statute contemplates such changes in the approved plans as are required by or are reasonably incidental to a compliance with orders made by these Boards in this connection.

I find no provision in the statutes authorizing the Harbor and Land Commissioners to approve any changes in the plans for the construction of the canal after they have once approved the plans. In my opinion, after they have once approved the plans under section 4 of the act of 1899, they have no further jurisdiction over the matter.

The Joint Board has no jurisdiction over the matter raised by your question except so far as it is involved in the certification by it that work covered by various requisitions has been completed in accordance with the contract. Its sole duty in this respect is to determine whether the work which it is asked to certify has been done in accordance with the contract. In making this determination it is the duty of the Board to determine whether any variations which it finds from

the plans and specifications are merely incidental changes or are changes of the character which I have outlined, and are thus contemplated by the statutes and the contract. If such changes are purely incidental, not matters of substance, or if they are incidental to or required by duly established points of crossing, the Joint Board may disregard them in certifying the work, but not otherwise.

Thus your inquiry may involve various questions of fact. I am informed that the omission of one of the passing places shown upon the plans approved by the Harbor and Land Commissioners was made necessary by the construction of the Sagamore bridge, in pursuance of the direction of the county commissioners and of the Joint Board, at the point where the passing place was originally planned. I am further informed that in the opinion of the chief engineer of the Construction Company and other engineering authorities this omission made it necessary as a practical matter to rearrange the location of all the passing places and, because of the shortness and character of the canal, to adopt an entirely new scheme of passing places. Thereupon, I am told, it was determined, with the approval of the engineer of the Joint Board, to construct passing places or enlargements of the canal at each end of it. I understand that this was in fact done, and that it involved at least as much excavation as the passing places originally planned.

I do not attempt to pass upon the questions of fact thus raised. They come within the province of your Board. If, upon consideration of the facts and the opinions of the engineers, you conclude that the adoption of a new scheme of passing places was made a practical necessity by the location and construction of the Sagamore bridge under the orders of the county commissioners and your Board, and that the scheme of passing places adopted was a fair and reasonable substitute for those originally planned, in my opinion you may in that event certify that the canal has been completed in accordance with the contract, notwithstanding the failure to construct the passing places shown on the plans approved

by the Harbor and Land Commissioners. Unless you reach such a conclusion, in my opinion you are not now warranted in issuing your final certificate.

4. Your fourth question is as follows:—

Can the Joint Board, under the statutes relating to the Cape Cod Canal, and under the contract between the Canal Company and the Construction Company, either with or without the consent of the Canal Company, require the construction of a similar passing place at another point in the canal in substitution for the passing place not constructed as called for by the plans of construction approved by the Board of Harbor and Land Commissioners and by the contract and specifications between the Canal Company and the Construction Company approved by the Joint Board which was to be at the point since designated by the county commissioners of Barnstable County for and now occupied by the Sagamore bridge, built in accordance with plans approved by the Joint Board?

My answer to the preceding question fully answers this question.

5. Your fifth question is as follows:—

Can the Joint Board, under the statutes relating to the Cape Cod Canal, and under the contract between the Canal Company and the Construction Company, either with or without the consent of the Canal Company, in lieu of a strict conformity with the contract between the Canal Company and the Construction Company requiring the Construction Company to turn over to the Canal Company a dredging plant with a view to its maintenance by the latter company for the operation of its canal, accept an agreement on the part of the Canal Company to contract for doing the necessary dredging, or allow, in certifying requisitions for payments under the contract and approving stock and bond issues by the Canal Company, a claim of the Construction Company for extra labor and materials furnished for the construction of the canal to be offset against the obligation of the Construction Company to turn over such dredging plant?

In my opinion, the turning over to the Canal Company by the Construction Company of a dredging plant is a mere incidental matter in connection with the performance of the contract between these corporations. If the Joint Board is satisfied that the Canal Company has made suitable arrangements for dredging the canal from time to time during the

course of its maintenance and operation, I see no reason why it should not certify the completion of the work covered by the contract, even though this dredging plant is not thus turned over. If, as a result of this or other similar incidental omissions in the work specified by the contract, stock or bonds of the Canal Company remain unissued after all work covered by the contract has been paid for, I see no reason why the Joint Board, under paragraph 5 of the contract, should not certify additional work to be paid for by the use of such unissued stock and bonds.

6. Your sixth question is as follows:—

Can the Joint Board, under the statutes relating to the Cape Cod Canal, and under the contract between the Canal Company and the Construction Company, require the building of a basin or enlargement of the width of the canal with bulkheading between the Bourne highway bridge and the New York, New Haven & Hartford railroad bridge, if determined by the Joint Board to be necessary for the protection and use of the canal or of the railroad and highway bridges crossing it?

In view of the principles which I have already laid down, I must answer this question in the negative. Jurisdiction over such matters, if it exists anywhere, is now in the Public Service Commission.

7. Your seventh question in substance asks my opinion as to what board or boards, if any, have authority to regulate the draw in the railroad bridge crossing the canal, and also the draws in any highway bridges crossing the canal.

In my opinion, the regulation of the use of the draw in the railroad bridge is now entirely a matter within the jurisdiction of the Public Service Commission.

Section 14 of the act of 1899 provides, in part, as follows:—

Said canal company shall provide and maintain in the towns of Bourne and Sandwich, at such points as may be designated by the county commissioners, suitable ferries or bridges across the canal, or a suitable tunnel or tunnels under the same, for passengers and vehicles, to be operated free from tolls, *under reasonable rules to be established by the county commissioners*, except that the canal company shall not be required to maintain a ferry if a highway, bridge or tunnel shall be built at or near any of said points. . . .

In my opinion, under the authority to establish reasonable rules granted to the county commissioners by the foregoing provision, they have the right to regulate the use of draws in any of the highway bridges crossing the canal. So far as this canal is concerned, this provision, in my opinion, supersedes the general authority granted by R. L., c. 52, § 26, to cities and towns to make ordinances or by-laws regulating the passage of vessels through drawbridges.

8. Your eighth question refers to the fact that the Canal Company, in pursuance of an order of your Board, has established a temporary ferry at a point in the village of Bournedale designated by the county commissioners; that on May 11, last, your Board determined that a passenger and vehicular ferry should be the permanent means of crossing the canal at this point, and that the time for the completion of this ferry has been extended by your Board to July 1, 1917. You then inquire: —

Can the canal be regarded as completed, or can the Joint Board certify that 100 per cent. of the total amount of labor to be performed and material to be furnished under the contract and specifications between the Canal Company and the Construction Company approved by the Joint Board June 3, 1907, has been performed and furnished —

(a) Before the vehicular and passenger ferry described in the last two mentioned votes has been installed by the Canal Company?

(b) Before the passing places in the canal, called for by the plans of the construction thereof approved by the Board of Harbor and Land Commissioners and called for by the contract and specifications between the Canal Company and the Construction Company, have been constructed or before the dredging plant called for by said contract has been turned over to the Canal Company by the Construction Company?

(c) Prior to the installation of a lock or basin or the enlargement of the width of the canal, should these or any of them be subsequently ordered by the Joint Board?

The specifications of the contract for the construction of the canal (p. 27), after referring to certain contemplated highway crossings of the canal, provide: —

The contractor shall allow the sum of \$75,000 for such crossings and in case the cost thereof shall be more or less than the said sum, after allowing

10 per cent. for the contractor's profits, a proper allowance shall be made for the same by or to the contractor.

Accordingly, in my opinion, the canal can be regarded as completed in accordance with the contract, for the purpose of full certification by the Joint Board of all the stock and bonds to be issued under the contract in payment for the performance of the contract, before the ferry described in your question has been installed, only in the event that the sum of \$75,000 has already been expended by the Canal Company for highway crossings. In that event, the expense of installing the ferry becomes additional work under the contract, but not otherwise. Subdivision (b) of your question is answered by my answer to your third question. In answer to subdivision (c) of your question, it is plain from my previous opinion to your Board that the installation of a lock or tidal gate would be additional work not covered by the contract, and therefore is not to be considered in certifying the performance of the contract. The matter of the installation of the basin or enlargement of the canal, to which you refer, has already been fully discussed in answering your third question.

9. Your ninth question is as follows:—

Upon the completion of the canal does the jurisdiction or authority of the Joint Board in relation to said canal expire by limitation?

Section 1 of chapter 519 of the Acts of 1910, already referred to, plainly requires a negative answer to this question.

10. Your tenth question is as follows:—

Section 3 of chapter 448 of the Acts of 1899 provides that said canal when completed shall be under the jurisdiction of the Harbor and Land Commissioners. What is the nature and extent of the authority and jurisdiction of said commissioners in regard to the canal under this provision?

In view of the provisions of the Public Service Commission act already quoted it is a grave question whether the Harbor and Land Commissioners any longer have any jurisdiction in regard to the canal, under the section to which you refer.

Your question is too broad a one to deal with at the present time. I prefer to leave its consideration until some case has arisen in connection with which the successor of that Board desires my advice as to its jurisdiction.

11. Your eleventh question is as follows: —

Section 1 of chapter 448 of the Acts of 1899 provides that the Boston, Cape Cod & New York Canal Company is incorporated "with all the privileges and subject to all the duties, restrictions and liabilities set forth in all general laws which now are or may hereafter be in force relating to railroad corporations, so far as they are applicable, except as hereinafter provided." Under this provision of the statute, what is the nature and extent of the authority and jurisdiction of the Public Service Commission in regard to the canal?

Since the enactment of the Public Service Commission act, particularly those provisions to which I have referred, the effect of the language of section 1 of the act of 1899 which you quote has become unimportant. The Public Service Commission, in my opinion, has exclusive jurisdiction over the Canal Company to the extent granted by the Public Service Commission act. The extent and limitations of this jurisdiction must be left to be determined from time to time as specific questions arise under it requiring a determination by the Public Service Commission.

AUTOMOBILES — REGISTRATION — "OWNER."

Where an automobile has been sold under a conditional sale agreement whereby the vendor retains title for the purpose of security, the conditional vendee who has rightful possession is the owner within the meaning of St. 1909, c. 534, § 2, providing for the registration of motor vehicles by the owners thereof.

To the
Massachusetts
Highway
Commission.
1916
September 20.

You request my opinion upon the question of whether an automobile which has been sold under a conditional sale agreement whereby the vendor retains title for the purpose of security should be registered in the name of the conditional vendor or the conditional vendee.

St. 1909, c. 534, § 2, provides that —

Application for the registration of motor vehicles may be made by the owner thereof. . . .

Section 9 of this chapter provides, in part, as follows:—

No motor vehicles shall be operated after midnight on the thirty-first day of December in the year nineteen hundred and nine unless registered in accordance with the provisions of this act. . . .

The answer to your question depends upon what interpretation should be given to the word “owner,” as used in this statute.

I am of the opinion that the conditional vendee of an automobile is to be regarded as coming within the term “owner” so long as he is in rightful possession of such vehicle. In arriving at this conclusion I am influenced by the following considerations:—

1. The conditional vendee under such a sale, while not the holder of the legal title, is, nevertheless, the owner of a certain property in the article sold. As was said by the court in the case of *Keith v. Maguire*, 170 Mass. 210:—

The word “owner” is not a technical term. It is not confined to the person who has the absolute right in a chattel, but also applies to the person who has the possession and control of it. Thus it has been said in this Commonwealth, in *Hartford v. Brady*, 114 Mass. 466, 470, a case under the Gen. Sts., c. 25, § 25 (Pub. Sts., c. 36, § 27), by which the owner of cattle is made liable for injury done by them: “The word ‘owner’ is intended to include the person in whom is the general property in the animals, while it embraces also those who are in possession of them under a special title, or by virtue of any lien.” See also *Wisconsin River Log Driving Association v. Comstock Lumber Co.*, 72 Wis. 464; *Hughes v. Sutherland*, 7 Q. B. D. 160; *The Queen v. St. Marylebone*, 20 Q. B. D. 415; *Lewis v. Arnold*, L. R. 10 Q. B. 245; *Dawson v. Midland Railway*, L. R. 8 Ex. 8.

There are other cases where the word “owner” has been held to mean the person in possession and control, and not to include the absolute owner. *Camp v. Rogers*, 44 Conn. 291; *Caudwell v. Hanson*, L. R. 7 Q. B. 55; *Meiklereid v. West*, 1 Q. B. D. 428.

2. It is a primary rule of statutory construction that an act must be construed as a whole so as to make the part in ques-

tion consistent, if possible, with the rest of the chapter. Section 2 of this act provides, in part, as follows:—

A person who before the first day of August in any year transfers the ownership *or loses possession* of an automobile registered in his name and who applies for the registration of another motor vehicle of less horse power than that of the vehicle so transferred, shall be entitled, upon payment of the proper fees set forth in section twenty-nine, to a rebate equivalent to one-half the difference between the respective fees for the higher and the lower horse powers, and a person under like conditions who does not apply for the registration of another automobile but who on or before the first day of September in the same calendar year files in the office of the commission a written application for a rebate, shall be entitled to a rebate of one-half the fee paid for the registration of such vehicle.

To hold that the word “owner” meant only the owner of the legal title would necessarily involve a result which it cannot be presumed was intended by the Legislature. Under this theory the owner of an automobile, having sold the same under a conditional sale agreement whereby he retained title for the purpose of security, would thereby necessarily lose possession of it, at least until the condition was broken by the vendee, and under the language of the statute last above quoted, would seem to be entitled to a rebate of one-half the fee of registration if he applied therefor before the first day of September, notwithstanding that he still remained the owner.

For the foregoing reasons I am of the opinion, as above indicated, that in the hypothesis given an automobile may be properly registered in the name of the conditional vendee who has rightful possession thereof.

MILITIA — NATIONAL GUARD — UNITED STATES SERVICE —
ABILITY OF OFFICERS TO ACT IN DUAL CAPACITY.

The militia of the Commonwealth having complied with the provisions of the act of Congress of June 3, 1916, its officers, upon being called into the service of the United States, are subject to the orders and control of the President of the United States while in such service, and in so far as their duties in such service are inconsistent with their duties as officers of that part of the National Guard not called into the service of the United States, the Governor, as Commander-in-Chief of the militia, may appoint others to serve temporarily in their places. Until this is done, however, the acts of such officers are valid when acting in the capacity of State officers.

I beg to acknowledge your communication in which you ask my opinion on the following: —

To the
Governor.
1916
September 20.

The chief surgeon, the chief ordnance officer, the colonel commanding the Sixth Regiment Infantry, and a large number of other State officers are now, although in the Commonwealth, on United States duty, subject to the orders of the President under the acts of Congress of Jan. 21, 1903, June 3, 1916, and other acts.

To some extent they are still exercising their duties as State officers, but there is a question as to what authority, if any, I would have over them in case of an emergency arising in the State where their services were required.

Moreover, there may be a question of whether or not various acts, such as issuing orders, acting on State boards, approving bills, etc., are legal.

I therefore request that you furnish me your opinion upon the status of these officers, my authority over them and their right to act as State officers.

Sections 57, 58, 101 and 118 of the act of Congress of June 3, 1916, provide as follows: —

SEC. 57. *Composition of the Militia.*—The militia of the United States shall consist of all able-bodied male citizens of the United States and all other able-bodied males who have or shall have declared their intention to become citizens of the United States, who shall be more than eighteen years of age and, except as hereinafter provided, not more than forty-five years of age, and said militia shall be divided into three classes, the National Guard, the Naval Militia, and the Unorganized Militia.

SEC. 58. *Composition of the National Guard.*—The National Guard shall consist of the regularly enlisted militia between the ages of eighteen

and forty-five years organized, armed, and equipped as hereinafter provided, and of commissioned officers between the ages of twenty-one and sixty-four years.

SEC. 101. *National Guard, when subject to Laws governing Regular Army.*—The National Guard when called as such into the service of the United States shall, from the time they are required by the terms of the call to respond thereto, be subject to the laws and regulations governing the Regular Army, so far as such laws and regulations are applicable to officers and enlisted men whose permanent retention in the military service, either on the active list or on the retired list, is not contemplated by existing law.

SEC. 118. *Necessary Rules and Regulations.*—The President shall make all necessary rules and regulations and issue such orders as may be necessary for the thorough organization, discipline, and government of the militia provided for in this act.

It is apparent that the act of June 3, 1916, entitled "An Act for making further and more effectual provision for the national defense, and for other purposes," was passed by Congress partly for the purpose of centralizing the control over the militia of the various states and territories. Prior to the enactment of this legislation more freedom was given to the states and territories in dealing with their militia, and up to this time the militia was considered a state rather than a national organization.

Since the militia of this Commonwealth has complied with the provisions of the act and become a part of the National Guard, as provided by section 58, so much thereof as is at the present time in the service of the United States is subject to the rules and regulations governing the regular army, as provided by section 101. By section 118 the President is given authority to "make all necessary rules and regulations and issue such orders as may be necessary for the thorough organization, discipline, and government of the militia provided for in this act." Subject to such rules, regulations and orders that part of the National Guard not in the service of the United States is subject to the control of the several States.

I am therefore of the opinion that the officers mentioned in your communication who are on United States duty in this

Commonwealth are subject to the orders and control of the President of the United States.

In so far as service in the United States is inconsistent with the performance of their duties as officers of that part of the National Guard not called into the service of the United States, I am of the opinion that such officers cannot properly act as officers of that part of the National Guard. Whenever in your opinion as Commander-in-Chief such officers cannot properly perform their duties as State officers, it is my opinion that you can detail others to serve in their places while they are temporarily in the service of the United States. Until others are detailed in their places, I am of the opinion that acts of officers of the National Guard called into the service of the United States in issuing orders, acting on State boards and approving bills, so long as such acts comply with the laws of the Commonwealth, are legal.

VETERANS — RELIEF — LIABILITY OF CHILDREN FOR SUPPORT.

The relief provided for veterans and their families by R. L., c. 79, § 18, as amended by Gen. St. 1916, c. 116, § 1, is available independently of Gen. St. 1915, c. 163, § 1, imposing a liability upon children of sufficient means to provide for their destitute parents.

I beg to acknowledge your letter in which you ask my opinion on the following: Whether the provisions of Gen. St. 1915, c. 163, relative to the support of destitute parents, extend to cases of parents drawing soldiers' relief under R. L., c. 79, §§ 18 and 19, from cities and towns in this Commonwealth, or has the soldier or widow an independent status or right to receive soldiers' relief, although the children may be able to provide for him or her.

R. L., c. 79, § 18, as amended by Gen. St. 1916, c. 116, § 1, provides, in part, as follows: —

If a person who served in the army or navy of the United States in the war of the rebellion and received an honorable discharge from all

To the
Commissioner
of State Aid
and Pensions.
1916
September 26.

enlistments therein, and who has a legal settlement in a city or town in the commonwealth, becomes, from any cause except his own criminal or wilful misconduct, poor and entirely or partially unable to provide maintenance for himself, his wife or minor children under the age of sixteen years, or for a dependent father or mother; or if such person dies leaving a widow or such minor children or a dependent father or mother without proper means of support, such support shall be accorded him or his said dependents as may be necessary by the city or town in which they or any of them have a legal settlement. . . .

R. L., c. 79, § 19, is as follows: —

The mayor and aldermen of a city or the selectmen of a town shall furnish such relief without a vote of the city council or of the town authorizing them thereto. Such relief shall be furnished only by, through or under the agency or direction of city or town officers who are authorized to disburse state or military aid. If the mayor and aldermen or the selectmen fail to furnish it, any person who is aggrieved may apply to the commissioners of state aid, who shall forthwith make a thorough investigation of the qualifications and circumstances of the applicant and shall determine the amount of relief, if any, to be given to him. Their decision shall be final, but may at any time be amended or reversed by them.

Gen. St. 1915, c. 163, § 1, provides: —

Any person, above the age of twenty-one years, who, being possessed of sufficient means, unreasonably neglects or refuses to provide for the support and maintenance of his parent, whether father or mother, residing in this commonwealth, when such parent through misfortune and without fault of his own is destitute of means of sustenance and unable by reason of old age, infirmity or illness to support and maintain himself or herself, shall be punished by a fine not exceeding two hundred dollars, or by imprisonment for not more than one year, or by both such fine and imprisonment. No such neglect or refusal shall be deemed unreasonable as to a child who shall not during his or her minority have been reasonably supported by such parent, if the parent was charged with the duty so to do, nor as to any child who, being one of two or more children, has made proper and reasonable contribution toward the support of such destitute parent.

When the Legislature made the provisions for soldiers' relief it is apparent that it intended to provide for the support of the Civil War veteran and his dependents as a reward for the service rendered by him to the Nation in its time of need.

R. L., c. 79, § 18, as amended, and § 19, made it obligatory upon the authorities of cities and towns to furnish relief to a veteran who has a legal settlement in a city or town in this Commonwealth who is unable, through no fault of his own, to support himself; and in case he died leaving a dependent father or mother without proper means of support, such parent would be entitled to such support as might be necessary from the authorities of the city or town in which either had a legal settlement.

In my judgment, Gen. St. 1915, c. 163, was intended to make children who were in comfortable circumstances and negligent in the care of their destitute parents fulfil their duty towards them. It is clearly evident that this Commonwealth did not intend that its veteran soldiers or their dependents should be compelled to resort to its courts before becoming eligible to secure the aid which the Commonwealth is in duty bound to furnish. Accordingly, I am of the opinion that the soldier or widow has an independent status, or right to receive soldiers' relief, irrespective of the provisions of Gen. St. 1915, c. 163.

MILITIA — COMPENSATION — TERMINATION OF SERVICE.

A furlough temporary in character or for a short period of time granted to one who has been mustered into the military service of the United States is not a termination of such service within the meaning of Gen. St. 1916, c. 310, § 1, but a furlough for an indefinite period would be.

Non-commissioned officers and men who were mustered into the military service of the United States, as described in the act above mentioned, who are ordered to remain in Massachusetts to instruct recruits for service on the Mexican border, or other work incidental to such instruction, are entitled to the benefits of this act.

You have asked my opinion as to certain questions which have arisen with reference to the proper construction of section 1 of chapter 310 of the General Acts of 1916. That section is as follows:—

There shall be allowed and paid out of the treasury of the commonwealth to each non-commissioned officer and soldier who has been, or who is hereafter, mustered into the military service of the United States as a part of the quota of this commonwealth for service on the Mexican

To the
Treasurer and
Receiver-
General.
1916
October 4.

Border, the sum of ten dollars per month. Said amount shall be payable monthly at the office of the treasurer and receiver general, and shall date from the muster-in to the United States service of said non-commissioned officer or soldier, and shall continue until January fifteen, nineteen hundred and seventeen, unless the service is sooner terminated. In case of the death of any enlisted man, his widow, minor children, parents or dependents shall receive the said monthly compensation for the period to January fifteen, nineteen hundred and seventeen.

Your first inquiry is whether the service specified in this section is to be regarded as terminated within the meaning of the statute when a furlough has been granted. This, in my opinion, depends upon the character of the furlough. If it is for a short period of time, and thus merely temporary in its character, and the soldier is still receiving pay from the United States, such a furlough is, in my opinion, to be regarded merely as a temporary excuse from duty and not as a termination of the service within the meaning of the statute. In that event, you should make payment under the statute without reference to the furlough. If, on the other hand, a furlough is granted for an indefinite period, and by it the soldier or non-commissioned officer is entirely relieved from his duties "as a part of the quota of this commonwealth for service on the Mexican Border" until he is again summoned for such duty, in my opinion in such a case the furlough is to be regarded as a termination of the service, and the payment provided for by the statute is to cease with the beginning of the furlough.

You also inquire whether non-commissioned officers and soldiers who were mustered into the military service of the United States as described in this act, but who were ordered to remain in Massachusetts to instruct recruits for service on the Mexican Border or for other work in Massachusetts incidental to such instruction, come within the provisions of the statute.

By its express terms the statute applies to all non-commissioned officers and soldiers mustered into the military service of the United States as a part of the quota of this Commonwealth for service on the Mexican Border. In my opinion this provision does not require that a non-commissioned officer or

soldier shall actually be sent to the Mexican Border and perform his duty there. If such an officer or soldier was in fact mustered into the military service of the United States as a part of the quota of the Commonwealth, and still remains a part of that quota, performing duties incidental to the service of the quota on the Mexican Border, he comes within the provisions of the statute, whether those duties are performed on the Mexican Border, in the Commonwealth of Massachusetts or anywhere else. In my opinion the non-commissioned officers and the soldiers to whom you refer are entitled to the payments specified in the statute.

GAME — OPEN SEASON — SUSPENSION.

Under St. 1909, c. 422, § 1, the Governor is not authorized to issue a proclamation suspending the open season until such season begins.

I beg to acknowledge your communication requesting my interpretation of the words "during an open season" as used in section 1 of chapter 422 of the Acts of 1909.

To the
Governor.
1916
October 11.

This section provides that "whenever, during an open season for the hunting of any kind of game in this state, it shall appear to the governor that by reason of extreme drouth the use of firearms in the forest is liable to cause forest fires, he may, by proclamation, suspend the open season."

It is my view that you are not authorized to issue such a proclamation until it shall appear to you, during an open season, that by reason of drouth the use of firearms in the forest is liable to cause forest fires. In other words, I do not think you are authorized to anticipate a condition which may not arise.

Accordingly, I am of the opinion that until the open season begins you are not authorized to issue your proclamation under the provisions of said section.

WEIGHTS AND MEASURES — PROSECUTIONS FOR VIOLATIONS OF
LAW — PROCEDURE.

A prosecution may be instituted by the Commissioner of Weights and Measures for a violation of St. 1907, c. 394, without giving the parties concerned notice and an opportunity to be heard.

To the
Commissioner
of Weights
and Measures.
1916
October 21.

You request my opinion as to whether a prosecution may be begun under the provisions of chapter 394 of the Acts of 1907 without giving the party concerned an opportunity to be heard by you under the provisions of section 8 of chapter 653 of the Acts of 1914.

Chapter 394 of the Acts of 1907, as amended by chapter 163 of the Acts of 1911, provides: "Whoever, himself or by his servant or agent or as the servant or agent of another person, gives or attempts to give false or insufficient weight or measure shall for a first offence be punished" as therein provided. This obviously applies to vendors of goods or merchandise sold by weight or measure. There is no limitation in this statute as to the manner in which prosecutions under it should be begun.

Chapter 653 of the Acts of 1914 makes it a criminal offence to "sell or offer for sale an article of food in package form, unless the net quantity of the contents be plainly and conspicuously marked on the outside of the package in terms of weight, measure or numerical count." Obviously this provision applies only to persons engaged in selling articles of food put up in package form. It cannot apply to articles sold from bulk by weight or measure. The offence is not giving false weight or measure, but selling a package which is not marked as required by statute. This last-mentioned statute contains the following provisions:—

SECTION 7. It shall be the duty of the commissioner of weights and measures to enforce the provisions of this act.

SECTION 8. Before prosecution is begun hereunder, the parties concerned shall be notified and given an opportunity to be heard before the commissioner of weights and measures.

In my opinion these statutes create and punish two separate and distinct offences. The last-mentioned statute in no way

affects or modifies the statute of 1907. Accordingly, in my opinion, sections 7 and 8 of the statute of 1914 have no application to violations of the statute of 1907, and I must advise you that prosecutions may be begun for violation of the statute of 1907 without first giving the party interested an opportunity to be heard before you in accordance with the provisions of section 8 of chapter 653 of the Acts of 1914.

CIVIL SERVICE — SUPERINTENDENTS OF ENGINEERING AND OF COMMERCE.

Appointments to the positions of superintendent of engineering and superintendent of commerce, created by Gen. St. 1916, c. 288, are not subject to the rules and regulations of the Civil Service Commission.

You have requested my opinion as to whether any appointments that may be made to the positions of superintendent of engineering and superintendent of commerce, created under Gen. St. 1916, c. 288, are to be filled under the regulations of the Civil Service Commission.

To the Commission on
Waterways and
Public Lands.
1916
October 24.

At the time of the passage of said act the Civil Service Commission, under the provisions of R. L., c. 19, was authorized from time to time to prepare rules regulating the selection of persons to fill appointive positions in the government of the Commonwealth. Ordinarily, the passage of an act creating appointive positions in the government of the Commonwealth would be subject to the provisions of chapter 19 of the Revised Laws, for the reason that it is not to be presumed that the Legislature intends to repeal or affect general laws passed by its predecessors unless there is something in the act, either by reason of its inconsistency with the general law or otherwise, which indicates an intention that the provisions of the general law are not to apply to the positions created.

It follows that if nothing had been said in chapter 288 of the General Acts of 1916 in relation to the civil service, the positions thereby created would be subject to the provisions of law relating to the civil service, unless there was some inconsistency in their application. Section 3 of said chapter 288 provides:—

The commission shall appoint a superintendent of commerce and a superintendent of engineering who shall each receive such salary as the commission may determine, with the approval of the governor and council. They shall, under the control of the commission, perform such duties as may from time to time be assigned to them respectively by the commission. The commission may also employ such clerical and other assistance as may be necessary for the performance of its duties, subject to all general laws, now or hereafter in force, relating to appointments and employment in the civil service of the commonwealth.

It is to be noted that under said section the Legislature has provided specifically that all clerical and other assistance other than the superintendent of commerce and the superintendent of engineering shall be subject to all general laws now or hereafter in force relating to appointments and employment in the civil service of the Commonwealth. The Legislature, having thus specifically provided that the rules shall apply to all positions other than the superintendent of commerce and superintendent of engineering, indicated, it would seem, an intention that the positions of superintendent of commerce and superintendent of engineering should be excluded from the operation of the civil service law.

I am fortified in this opinion by the fact that section 9 of chapter 19 of the Revised Laws provides that —

Judicial officers and officers elected by the people or by a city council, or whose appointment is subject to confirmation by the executive council, . . . shall not be affected as to their selection or appointment by any rules made as aforesaid.

While it is not entirely clear that the appointment of these officials is subject to the confirmation of the Governor and Council, yet the compensation to be paid them is unquestionably subject to such confirmation and approval, and the salary, apparently applying to the persons appointed rather than to the positions, necessarily, in a large measure, determines the appointment.

Accordingly, for the foregoing reasons, I am of the opinion that your question is to be answered in the negative.

FIRE PREVENTION COMMISSIONER — AUTOMATIC SPRINKLER —
STABLES.

Under Gen. St. 1916, c. 158, § 2, providing that stables equipped with an automatic sprinkler system shall not be subject to certain other requirements, the word "stable" means the entire building, so that where the second floor of a building is used for stabling horses, this condition is not fulfilled by equipping that floor alone with an automatic sprinkler system.

With reference to chapter 158 of the General Acts of 1916 you have requested my opinion as to whether, in a three-story building in which horses are kept only on the second floor, the word "equipped," in section 2, would be construed to relate to all floors, or only to the floor where the horses are stabled, or to the floor or place where the horses are stabled plus the dangerous part or parts of other floors.

To the Fire
Prevention
Commissioner.
1916
October 25.

The statute mentioned is entitled "An Act to require fire protection in stables for horses and mules." The first two sections are as follows:—

SECTION 1. No horse or mule shall be stabled on the second or any higher floor of any building unless there are two means of exit therefrom, at opposite ends of the building, to the main or street floor.

SECTION 2. This act shall not apply to stables equipped with an automatic sprinkler system.

Your question first raises the inquiry as to whether the word "stables," in section 2, includes the whole building in which the animals in question are stabled, or merely that floor or part of the building which is used for that purpose.

Our Supreme Judicial Court has used the following language in the case of *Riverbank Improvement Co. v. Bancroft*, 209 Mass. 217, at 221:—

In Worcester's Dictionary, edition of 1900, a stable is defined as "a house or building for horses or other beasts;" in Webster's edition of 1903, as "a house, shed, or building, for beasts to lodge and feed in; especially, a building or apartment with stalls, for horses; as, a horse stable; a cow stable;" and in the edition of 1910 in practically the same language; in the Century Dictionary, as "a building or an inclosure in which horses, cattle, and other domestic animals are lodged, and which is

furnished with stalls, troughs, racks, and bins to contain their food and necessary equipments; in a restricted sense, such a building for horses and cows only; in a still narrower and now the most usual sense, such a building for horses only;" in the Standard Dictionary, edition of 1895, as a "building or part of a building set apart for lodging and feeding horses or cattle, especially one fitted with stalls, fastenings, etc., also often for storing hay or putting up vehicles: sometimes specifically carriage-stable, cow-stable, etc." In 36 Cyc. 812, and in 26 Am. & Eng. Encyc. of Law (2d ed.), 154, it is defined as "a house, shed, or building for beasts to lodge and feed in." See also *Dugle v. State*, 100 Ind. 259.

No other decision which has come to my attention throws any light upon this question, and it is to be observed that in the case cited the point decided did not relate to a situation such as is here presented. The apparent purpose of the present statute seems to be to provide protection for the animals named, in the event of fire, by providing ready means of exit or means for extinguishing any fire which may start. Obviously, the lives of the animals are endangered as much, if not more, by fires which have started on the first or third floors of a three-story building as by fires which may start on the second floor, and the purpose of the act would not be accomplished if it were held to require merely the equipment with a sprinkler system on the second floor of such a building as you describe.

Taking these considerations into account I am of the opinion that in using the word "stables," in section 2, the Legislature intended to describe the entire building used for that purpose rather than any particular floor or portion of the same.

Accordingly, I am of the opinion that, in order to obtain the benefit of the exemption provided for in section 2, it is necessary that all floors of a building such as is described in your request should be so equipped.

How extensive an installment of automatic sprinklers is necessary in order to comply with the provisions of this section is largely a question of fact. It probably is undesirable to attempt to lay down any hard and fast rule, such as saying that the "dangerous part or parts of other floors" are to be

provided with sprinklers. The language of the statute is, "equipped with an automatic sprinkler system." In my opinion, this requires a sprinkler system reasonably adequate for the premises in question, taking into account the character of the building and its parts with regard to the danger to be anticipated from fire.

SENTENCE — PERMIT TO BE AT LIBERTY — EFFECT.

Where a permit to be at liberty has been issued to a prisoner under R. L., c. 225, § 117, as amended by St. 1906, c. 244, if it is subsequently revoked, the prisoner is treated as not having served any portion of his sentence beyond the time he was held in prison, and therefore, if the revocation was made before the expiration of his original sentence, it is immaterial that the order of arrest issuing on such revocation is not served until after the expiration of such time.

You have requested my opinion as to whether the fact that a warrant issued before the expiration of the sentence of a prisoner released from the Massachusetts Reformatory under a permit to be at liberty, and served after the time when the sentence would have expired if the prisoner had not been released under a permit to be at liberty, makes his return and commitment to the Massachusetts Reformatory improper.

R. L., c. 225, § 117, as amended by St. 1906, c. 244, provides as follows: —

If it appears to the prison commissioners that a prisoner in the Massachusetts reformatory, or a prisoner who has been removed therefrom to a jail or house of correction, has reformed, they may issue to him a permit to be at liberty during the remainder of his term of sentence, upon such terms and conditions as they shall prescribe; but a prisoner who has been removed thereto from the state prison shall not be given a permit to be at liberty before the expiration of the minimum term of his sentence without the consent of the governor and council. They may delegate to a committee of their board or to their secretary, until their next meeting, the authority to decide when such permit shall be issued.

I assume that the prisoner was released under the provisions of this section.

To the Bureau
of Prisons.
1916
November 1.

R. L., c. 225, § 128, as amended by St. 1908, c. 251, provides for a revocation of such permit at any time previous to its expiration.

Section 129 of said chapter 225, as amended by St. 1903, c. 452, provides that upon such revocation the board having authority to revoke may issue an order authorizing the arrest of the holder of such permit and his return to the prison from which he was released; and further provides that —

A prisoner who has been so returned to his place of confinement shall be detained therein according to the terms of his original sentence. In computing the period of his confinement the time between his release upon a permit, or on probation, and his return to prison, shall not be considered as any part of the term of his original sentence. If at the time of the order to return to prison or of the revocation of his permit he is confined in any prison, service of such order shall not be made until his release therefrom.

These statutes in effect provide that a prisoner who in the judgment of the Board of Parole has reformed may be released upon a permit to be at liberty, but that in the event circumstances arise justifying the Board in revoking the permit prior to its expiration, then the prisoner shall be treated as if he had not served any portion of his sentence beyond the time he was held in prison. In other words, his status is the same as if he had escaped from prison at the time he was so released. This seems to be clear from the last part of said section 129, which provides that if at the time of the order to return to the prison or of the revocation of the permit he is confined in any prison, service of such order shall not be made until his release therefrom. The status of the prisoner seems to be determined by the revocation. If the revocation takes place before the expiration of the time of his original sentence, then he may be rearrested and returned to prison.

Accordingly, I am of the opinion that it is immaterial whether the order of arrest issued upon the revocation was served before or after the expiration of the time of his original sentence.

VACCINATION — CERTIFICATES OF EXEMPTION — REQUISITES.

Under R. L., c. 44, § 6, as amended by St. 1907, c. 215, providing for exemption from vaccination of children attending public schools upon a certificate signed by a regular practising physician that the child "is not a fit subject for vaccination," with the "cause stated therein," it is not necessary for the physician to emphasize further in his certificate that this is his opinion or that the cause stated is, in his opinion, sufficient to justify his statement; nor is it necessary that the physician signing such a certificate make a personal examination of the child.

You have submitted the following questions with reference to the validity of certain certificates for exemption from vaccination, namely: —

To the State
Department
of Health.
1916
November 6.

1. Must the physician make a personal examination?
2. Must the physician who signs the certificate be the one who makes this examination?
3. Must the certificate be so worded that it shows that it is the opinion of the examining and signing physician that the *cause* stated is sufficient?
4. Must not the certificate be so worded that it gives it as the *opinion of the physician who signs the certificate* that the child is not a fit subject for vaccination?

The Legislature has established at least three different regulations affecting children with reference to examinations by physicians on account of illness, or for the prevention of small-pox by vaccination.

St. 1906, c. 502, entitled "An Act relative to the appointment of school physicians," provides that a school physician shall make an examination of every child returning to school without a certificate from the board of health after absence on account of illness or from unknown cause, and in case such child shows symptoms of a contagious disease, he is to be prohibited from attending school by order of the school board. This statute, however, makes no reference to the subject of vaccination, nor does it give any authority to the school physician other than that of examination.

R. L., c. 44, § 6, as amended by St. 1907, c. 215, provides for certificates of exemption from vaccination of children attending public schools, and is as follows: —

A child who has not been vaccinated shall not be admitted to a public school except upon presentation of a certificate granted for cause stated therein, signed by a regular practising physician that he is not a fit subject for vaccination. A child who is a member of a household in which a person is ill with smallpox, diphtheria, scarlet fever, measles, or any other infectious or contagious disease, or of a household exposed to such contagion from another household as aforesaid, shall not attend any public school during such illness until the teacher of the school has been furnished with a certificate from the board of health of the city or town, or from the attending physician of such person, stating that danger of conveying such disease by such child has passed.

R. L., c. 75, §§ 136 to 139, inclusive, deal generally with the subject of vaccination. Section 139, as amended by St. 1902, c. 190, § 2, provides as follows: —

Any person over twenty-one years of age who presents a certificate signed by the register of a probate court that he is under guardianship shall not be subject to the provisions of section one hundred and thirty-seven; and any child who presents a certificate, signed by a registered physician designated by the parent or guardian, that the physician has at the time of giving the certificate personally examined the child and that he is of the opinion that the physical condition of the child is such that his health will be endangered by vaccination shall not, while such condition continues, be subject to the provisions of section six of chapter forty-four of the Revised Laws or of the three preceding sections of this chapter; and the parent or guardian of such child shall not be liable to the penalties imposed by section one hundred and thirty-six of this chapter.

It will be seen, therefore, that chapter 44 of the Revised Laws refers alone to vaccination for the purpose of attending school, and that the sections of chapter 75 of the Revised Laws apply to both children and adults, irrespective of school attendance. It will also be observed that said section 137 of chapter 75 gives the boards of health in cities and towns the right to enforce vaccination of all inhabitants, except as provided in section 139.

In answer to the questions submitted by you, assuming they relate to school attendance, it is evident that only R. L., c. 44, applies. If a child desiring admission to a public school presents a certificate, signed by a regular practising physician,

that "he is not a fit subject for vaccination," with the "cause stated therein," the statute is complied with. Under this chapter, a personal examination by a physician is not necessary, and hence your second question does not require an answer.

Your third question is to be answered in the negative, and your fourth question in the affirmative. The statute expressly provides that the exemption certificate shall state that the child "is not a fit subject for vaccination." That necessarily is a matter of opinion, and, as such, is the opinion of the physician signing the certificate. It would not seem necessary to require such physician to emphasize further his opinion by asserting that it is also his opinion that the cause stated is sufficient to justify his statement. The cause stated, in my judgment, must be an adequate and lawful one in order to give the certificate validity. A cause absurd on its face, showing a deliberate intent to evade the statute, in my opinion would not be a compliance with it.

R. L., c. 75, § 139, which is enforceable only by boards of health of cities and towns, compels a personal examination by a physician, and a statement that in his opinion the physical condition of a person is such that his health would be endangered by vaccination, in order to avoid the requirements of the chapter. Under this section no cause need be assigned by the physician for his statement.

It is to be noted that the provision for a certificate in section 6 of chapter 44 of the Revised Laws, as amended by St. 1907, c. 215, is not to be construed as taking away from the school committee the power to make proper regulations for the protection of all the pupils, if the prevalence of smallpox seems to require special precautions. When such a prevalence exists, under proper regulations the school committee can exclude all pupils who have not been vaccinated. *Hammond v. Hyde Park*, 195 Mass. 29.

INDUSTRIAL SCHOOL FOR GIRLS — REVOCATION OF SUSPENDED SENTENCE — AGE OF PERSON COMMITTED — POWER OF TRUSTEES.

Where a girl has been sentenced to confinement in the Industrial School for Girls while she was under the age of seventeen years, and the sentence then suspended, the suspension may be revoked and the girl committed to this institution, under St. 1913, c. 471, § 2, even after she has attained that age.

Where the order of commitment to this institution recites the age of the girl committed, the recital amounts to an adjudication by the court upon this question, and it is not the duty of the trustees of the institution to inquire into the correctness of this finding.

To the Trustees
of the Massa-
chusetts Train-
ing Schools.
1916
November 7.

You have requested my opinion upon the following questions: —

1. Have the trustees in charge of the Industrial School for Girls a right to retain custody of a person committed to the said institution who has in fact passed her seventeenth birthday at the time of commitment?

2. If, after commitment, it becomes a question of fact whether the person was not over seventeen years of age at the time of commitment, but the mittimus transmitted by the court of commitment recites the age as under seventeen years, what are the duties of the trustees in charge of the Industrial School for Girls under such circumstances, as regards the custody of the person committed?

3. Is the right of the trustees in charge of the Industrial School for Girls to retain custody of a girl who has passed her seventeenth birthday when she was committed to the said school affected by the fact that she had been sentenced to this institution prior to her seventeenth birthday, but the sentence had been suspended, and commitment then made after the seventeenth birthday by revocation of the suspension of sentence?

Taking up these questions in inverse order, the statute pertaining to the third question seems to be the following: —

Boys under fifteen years of age may be committed to the Lyman school by police, district and municipal courts and trial justices, and, except in the county of Suffolk, by judges of probate. Girls under seventeen years of age may be committed to the industrial school by said courts, judges and justices, except as aforesaid, and, except in the county of Suffolk, by commissioners, as hereinafter provided in this chapter. (R. L., c. 86, § 10.)

The provisions of law with reference to suspended sentences are: —

When a person convicted before a municipal, police or district court is sentenced to imprisonment, the court may direct that the execution of the

sentence be suspended, and that he be placed on probation for such time and on such terms and conditions as it shall fix. (R. L., c. 220, § 1, as amended by St. 1913, c. 653.)

At any time before the final disposition of the case of a person who has been placed on probation in the custody of a probation officer, the probation officer may arrest him without a warrant and take him before the court, or the court may issue a warrant for his arrest. When he is taken before the court, it may, if he has not been sentenced, sentence him or make any other lawful disposition of the case, and if he has been sentenced, it may continue or revoke the suspension of the execution of his sentence. If such suspension is revoked, the sentence shall be in full force and effect. (R. L., c. 220, § 2.)

In all cases the execution of orders of commitment to the Massachusetts reformatory, the reformatory for women, the Suffolk school for boys, the Plummer farm school of reform for boys, any truant school, however named, any house of reformation for juvenile offenders, the Lyman school, the industrial school for girls, the industrial school for boys, and the state board of charity, may be suspended, and such suspension continued or revoked, in the same manner and with the same effect as the execution of sentences in criminal cases. (St. 1913, c. 471, § 2.)

Accordingly, it seems that your question is directly answered by the enactment last quoted. The sentence in such case is imposed at a time when the defendant is less than seventeen years of age, and this is authorized by the statute. The provisions quoted above are to the effect that if suspension is revoked "the sentence shall be in full force and effect," and under St. 1913, c. 471, these provisions are made applicable to sentences to the Industrial School for Girls.

In my opinion, therefore, your third question is to be answered in the negative.

The two remaining questions raise the issue as to the duty of your Board to investigate and act upon claims presented that particular inmates have been improperly sentenced. R. L., c. 86, § 22, provides for the form of the warrant of commitment which is to be issued in the cases of girls sent to the Industrial School. This form contains the statement:—

You are hereby commanded to take charge of C. D., a boy (or girl) between the ages of seven and fifteen (or seventeen, if a girl) years.

I assume that warrants issued by the various courts of the Commonwealth in these cases comply with this requirement of the statute, and that being so, it would seem to furnish a complete warrant for your holding the particular person transmitted under it. It implies an adjudication upon the part of the court that that particular person, at the time of commitment, is less than seventeen years of age, and it can hardly be your duty to inquire into the correctness of such finding.

I am of opinion that such warrant is a complete authorization to you for holding such defendant.

In general, the officers of the Commonwealth to whom is entrusted the execution of the orders of the criminal courts cannot be required or supposed to question the correctness of those orders, and such orders furnish entire protection to such officials for acts done in executing them.

The cases of *Jones v. Robbins*, 8 Gray, 329, 330, and *Martin v. Collins*, 165 Mass. 256, which have been previously brought to your attention, are authority for these propositions. It is true that there may be some doubt as to the state of the law in protecting an officer serving a civil process of arrest beyond the jurisdiction of the court issuing it, but such cases do not seem to question the right of an officer to execute a criminal process valid upon its face.

Your questions, however, do not throw doubt upon the jurisdiction of the court, but only raise a question of doubt as to the validity of the sentence imposed, because of the age of the defendant.

Even in a civil case it has been held that an officer was protected in the execution of a warrant, although as a matter of fact the defendant was of such an age as to be exempt from arrest. *Cassier v. Fales*, 139 Mass. 461.

Accordingly, I am of the opinion that it is not your duty to attempt to try the question of fact as to whether a particular person has been properly sentenced or not. Such person can raise the question and have her rights adjudicated by proper proceedings in court.

ELECTRICIAN — MASTER'S CERTIFICATE — EXAMINATION.

A "master electrician's certificate" cannot be granted to a person, firm or corporation upon the examination of one who is merely an employee of such person, firm or corporation. But if the applicant for such a certificate is a person, the examination must be taken by him personally; if a firm, by a member of the firm; or if a corporation, by an officer of the corporation.

You have requested my opinion as to whether a master's certificate to do business under the provisions of Gen. St. 1915, c. 296, § 3, can be granted to a person, firm or corporation engaged in, or about to engage in, the business of installing electrical wires, conduits, apparatus, fixtures and other electrical appliances, assuming that the person so applying, or a member of the firm, or an officer of the corporation so applying, does not submit to take the examination required, but such examination is taken by a person who is an employee of the person, firm or corporation applying for the license.

To the State
Examiners of
Electricians.
1916
November 10.

The provisions of the act mentioned are far from clear upon this point. The act provides that your Board shall hold frequent examinations in the city of Boston, and twice each year in five other convenient places within the Commonwealth. Section 2 also provides that "said examinations shall be sufficiently frequent to give ample opportunity for all applicants to be thoroughly and carefully examined. . . ."

Section 3 provides, in part: —

(1) Two forms of licenses shall be issued: — The first, hereinafter referred to as "certificate A", shall be known as "master electrician's certificate." . . .

A "master's certificate" shall be issued to any person, firm or corporation engaged in or about to engage in the business of installing electrical wires, conduits, apparatus, fixtures and other electrical appliances, that shall have qualified under the provisions of this act. A certificate of registration shall be issued specifying the name of the person, firm or corporation so applying, and the name of the person passing said examination, by which he or it shall be authorized to enter upon or engage in business as set forth therein: . . .

(3) All certificates "A" described in paragraph (1) of this section

shall expire on the thirty-first day of July in each year, but may be renewed by the same person, firm or corporation, as represented by one or more of its members or officers, without further examination. . . .

The provision that the certificate of registration "shall be issued specifying the name of the person, firm or corporation so applying, *and the name of the person passing said examination,*" on its face might seem to indicate that the examination might be taken by some other person than the applicant. However, it is to be observed that in case the applicant is a corporation the examination must be taken by some individual, and in the case of a partnership might be taken by one member of the firm, so that a reason for the Legislature inserting this requirement is apparent, even if in the case of individuals it was intended that the applicant for the certificate should be obliged to take the examination in person.

There is no definite categorical provision for the manner of examination in the case of a partnership or corporation.

In the case of an individual it would seem to be a most impracticable arrangement if an examination which would satisfy the provisions of the law might be taken by an employee. As a practical matter the requirement of the examination might be rendered entirely nugatory, as a person could be employed for a day or two, while the examination was being taken, and then his services dispensed with after the certificate had been obtained.

The provision of section 2, that "said examinations shall be sufficiently frequent to give ample opportunity for all applicants to be thoroughly and carefully examined," shows a slight indication that the applicants for licenses are to take the examinations. The further provision of section 3, paragraph (3), for renewal by "the same person, firm or corporation *as represented by one or more of its members or officers,*" further indicates the intention of the Legislature as to the manner of issuance of certificates to firms and corporations.

I see no reason for thinking that the Legislature intended that the firm or corporation should be represented by different

classes of persons in the application for renewal from those authorized to do so upon the original application for license, and from this section quoted it would appear that in such application and examination a firm is to be represented by one or more of its members, and a corporation by one or more of its officers.

Accordingly, although the matter is not entirely clear, I am of the opinion that a master's certificate, under the provisions of Gen. St. 1915, c. 296, is not to be granted when the person applying, or a member of the firm or officer of the corporation so applying, has not passed the examination prescribed, and that taking and passing such an examination by a person who is merely an employee of the applicant does not satisfy the terms of the statute.

HAWKER AND PEDLER — A PERSON LICENSED AS A JUNK COLLECTOR WHO COLLECTS JUNK SOLELY BY BARTER — "SALE."

A barter or exchange of goods, wares or merchandise is not strictly a sale, and consequently a person licensed as a junk collector under St. 1902, c. 187, who collects junk solely by barter of articles of merchandise not mentioned in R. L., c. 65, § 15, is not required to be licensed under the hawker's and pedler's statute.

I beg to acknowledge your request for my opinion as to whether a person licensed as a junk collector, and authorized "to collect, by purchase or otherwise, junk, old metals and secondhand articles from place to place" in a city or town under the provisions of chapter 187 of the Acts of 1902, is required to be licensed as a hawker or pedler in case he exchanges for such junk goods, wares or merchandise not mentioned in section 15 of chapter 65 of the Revised Laws, as amended.

At the time of the enactment of chapter 187 of the Acts of 1902 a hawker or pedler was defined by Revised Laws, chapter 65, section 13, as a person who "goes from town to town or from place to place in the same town carrying for sale or ex-

To the Commissioner of
Weights and
Measures.
1916
November 15.

posing for sale goods, wares or merchandise." By section 14 of this chapter, as then in force, "the sale by hawkers or pedlers" of certain articles was prohibited. By section 15 "hawkers and pedlers may sell without a license" certain specified articles. Section 16 was as follows:—

Articles other than those mentioned in the preceding section and not prohibited by section fourteen, including those of the growth or production of foreign countries, shall not be sold by hawkers or pedlers unless duly licensed as hereinafter provided.

Section 19 established a method for the licensing of hawkers and pedlers, and authorized such licensees within the territory specified in the license to "sell any goods, wares or merchandise, not prohibited in section fourteen."

It is to be noted that a barter or exchange of goods, wares or merchandise is in no way referred to in any of these sections.

The word "sale," both in common usage and in legal phraseology, is ordinarily used to indicate the disposition of property for a price payable in money in distinction from barter or exchange, where the consideration for the disposition of the goods is other goods received in return. See Century Dictionary, definition of "sale." In view of this ordinary meaning of the word "sale," and bearing in mind that the hawker's and pedler's statute is essentially penal and must be construed strictly, I am of the opinion that in the form in which it appears in the Revised Laws this statute did not apply to or in any way prohibit the barter or exchange of goods, wares and merchandise for other articles. This seems to be the construction which the Legislature itself has placed upon this section, for, by chapter 242 of the General Acts of 1916, the words "or barter" and "bartering" were added by amendment to section 13 of chapter 65 of the Revised Laws, and also section 19 of that chapter.

Accordingly, it follows that at the time of the enactment of chapter 187 of the Acts of 1902 a person who collected junk solely by barter was not a hawker or pedler nor subject to the statutes regulating hawkers and pedlers. It is plain, therefore,

that until the enactment of chapter 242 of the General Acts of 1916 a duly licensed junk collector was not required to have a hawker's and pedler's license in order to collect junk by bartering for it goods not mentioned in section 15 of chapter 65 of the Revised Laws.

The amendments made by chapter 242 of the General Acts of 1916, so far as material to the question under discussion, related only to the definition of a hawker or pedler, as set forth in section 13 of chapter 65 of the Revised Laws, and to the form of the license, as set forth in section 19. Section 14, prohibiting merely the sale of certain articles, section 15, authorizing merely the sale without a license of certain articles, and section 16, prohibiting the sale by hawkers and pedlers of all other articles unless duly licensed, were left unchanged.

It appears to be this last-mentioned section only which makes it possible to prosecute criminally unlicensed hawkers and pedlers. In view of the fact that section 16 prohibits only sales by unlicensed hawkers and pedlers, and in no way refers to barter, it is a grave question whether any person may not go from town to town or from place to place in the same town carrying merely for barter or exposing for barter goods, wares or merchandise, whether they are mentioned in section 15 or not.

In view of its penal nature it seems probable that the courts will construe section 16 strictly as applying only to sales by hawkers and pedlers and as not prohibiting bartering. However that may be, in my opinion it was not the intention of the Legislature, by the amendments made by chapter 242 of the General Acts of 1916, to bring within the scope of the hawker's and pedler's statute activities which were already fully regulated with ample license requirements by chapter 187 of the Acts of 1902. Such reduplication of regulation and license requirements would impose an undue and apparently unnecessary burden upon junk collectors, and the statute ought not to be construed to bring about such a result unless its terms plainly so require.

Accordingly, I advise you that a person licensed as a junk collector, under the provisions of chapter 187 of the Acts of

1902, who collects junk by barter of articles of merchandise not mentioned in section 15 of chapter 65 of the Revised Laws, and who makes no sales of such articles, is not required to be licensed under the hawkers and pedlers statute.

FOREST LAND — LIMIT OF PRICE TO BE PAID — INCIDENTAL EXPENSES.

Whether it would be advisable for the State Forest Commission to take a parcel of land by eminent domain rather than by purchase is not a question of law but one of policy for the commission itself to decide.

The restriction placed by St. 1914, c. 720, § 2, upon the price which may be paid per acre for land acquired under that act, refers only to the purchase price, and does not include incidental expenses such as for surveying and examining the title.

To the
State Forest
Commission.
1916
November 17.

I acknowledge your letter in which you request my opinion in relation to two questions, one as to the advisability of purchasing the interests of certain owners in tracts of land owned in common by these owners and the Commonwealth, rather than taking the interests of the owners by eminent domain; and the other as to whether the average cost of land purchased by the commission, restricted to \$5 an acre under the provisions of section 2 of chapter 720 of the Acts of 1914, includes the necessary expenses of engineering, conveyancing and examination of title and other incidental charges necessary to the purchase.

You state in relation to your first inquiry that the parcels of land involved are included in a large tract of land acquired in the name of the Commonwealth in the towns of Carver and Plymouth, and that the owners have asked a sum per acre in excess of other land purchased by the commission in this tract.

The question is necessarily one for your commission to determine, as there is no question of law involved.

My own view is that if the price at which you can secure the interest is not unreasonably large, and the excess over the fair value to be paid would be less than the cost of the trial of the cases, in this particular instance you would be justified in paying the amount demanded by the owners.

As to your second question, your commission, under the provisions of St. 1914, c. 720, § 2, has the power to acquire by purchase or otherwise land suitable for timber cultivation. The statute provides that the average cost of the land purchased by the commission shall not exceed \$5 an acre. This permits a higher price for some parcels and a lower price in other instances, provided the average cost does not exceed the amount specified. The language of the statute would indicate that this clause has reference only to the purchase price, and does not include incidental expenses, such as surveying, examination of title and other necessary charges.

OLEOMARGARINE — AUTHORITY OF BOARDS OF HEALTH TO LIMIT NUMBER OF LICENSES.

Under R. L., c. 56, § 70, authorizing boards of health of cities and towns to make reasonable rules and regulations as to the conditions under which all articles of food may be kept for sale, they may not limit the number of places where oleomargarine may be sold.

You desire to be informed as to whether there is any statute which authorizes local boards of health to make regulations limiting the number of licenses for the sale of oleomargarine in any particular town. In my opinion there is no such authority granted to the local boards of health.

To the State
Board of
Agriculture.
1916
November 17.

R. L., c. 56, § 40, requires that every person, before selling or offering for sale oleomargarine, shall register his name and proposed place of sale with the inspector of milk, or with the town clerk if there is no inspector of milk, and provides a penalty for neglecting so to register. By this statute the duties of the inspector of milk or of the town clerk are merely clerical. R. L., c. 56, § 70, as amended, authorizes boards of health of cities and towns to make and enforce reasonable rules and regulations, subject to the approval of the State Department of Health, as to the conditions under which all articles of food may be kept for sale, in order to prevent contamination thereof and injury to the public health. In my opinion, however, these provisions do not authorize boards of health to limit the number of places where such food may be sold.

TENURE OF OFFICE — WHETHER APPOINTMENT TO FILL VACANCY IS FOR UNEXPIRED PORTION OF TERM OF PREDECESSOR OR FOR A FULL NEW TERM.

Where a clerk of a district court resigned before the expiration of his term of office, and an appointment was made thereto by the Governor under R. L., c. 160, § 9, the appointee holds for a term of five years from the date of his appointment.

To the
Governor.
1916
December 5.

I acknowledge your request for my opinion as to whether an appointment on July 26, 1916, to the office of clerk of the central district court of northern Essex was for a term of five years from July 26, 1916, or for the balance of the time his predecessor would have continued in office but for his resignation.

Section 9 of chapter 160 of the Revised Laws is as follows: —

Clerks of police, district and municipal courts shall, except as provided in the three following sections, be appointed by the governor, with the advice and consent of the council, for the term of five years.

The provisions for the appointment of clerks in the three following sections relate to the appointment of a clerk by a justice of a police or district court for which no clerk is required by law; the appointment of assistant clerks by the clerks of police, district or municipal courts, and the appointment of temporary clerks by the court. There appears to be no provision for the appointment of clerks of police, district or municipal courts by the Governor except for the term of five years. I find that it has been the invariable practice of the office of the Secretary of the Commonwealth to issue the commissions in all cases for five years.

In view of the language of the statute and the practice that has heretofore obtained, I am of the opinion that the appointment referred to was for a term of five years from July 26, 1916.

GREAT PONDS — RIGHT OF ACCESS — LIABILITY FOR TRESPASS.

In general, the public has a right to pass and repass, for the purpose of hunting or fishing, and possibly other purposes, over uncultivated and unenclosed land belonging to private proprietors and bordering on a great pond, provided there is no other reasonable means of access thereto, without being liable for trespass. But no right of access exists, for the purpose of fishing, to great ponds of twenty acres or less where such ponds are entirely surrounded by land of private proprietors. There is no right of access, in any event, over cultivated land where access may be obtained over uncultivated and unenclosed land.

I acknowledge your letter in which you ask my opinion on the following question:—

In case all the land around a great pond of the Commonwealth is bought up, and is posted against trespass by the landowners, is there any provision of law whereby a right of way to this pond can be established for the benefit of the public?

To the Com-
missioners
on Fisheries and Game. *and*
1916
December 11.

The earliest reference to great ponds is found in the Body of Liberties, adopted in 1641 by the Massachusetts Bay Colony, and is as follows:—

Every inhabitant that is an howse holder shall have free fishing and fowling in any great ponds . . . within the presincts of the towne where they dwell, unlesse the free men of the same towne or the Generall Court have otherwise appropriated them, provided that this shall not be extended to give leave to any man to come upon others proprietie without there leave. Body of Liberties, § 16.

This, it will be observed, gave no right to cross the land of others except by their leave.

The amendments which concerned the sixteenth section, as they appear in the edition of the colony laws of 1660 and in the Ancient Charters, 148, were quite material and were adopted in 1649. Great ponds are defined as those containing more than ten acres of land, and it is provided that no town shall appropriate any great pond to any particular person or persons. Section 4 is as follows:—

And for great ponds lying in common, though within the bounds of some town, it shall be free for any man to fish and fowl there, and may

pass and repass on foot through any man's propriety for that end, so they trespass not upon any man's corn or meadow.

The effect of the provision which has been referred to in the Body of Liberties and its amendments was to reserve the great ponds for the public use. *West Roxbury v. Stoddard*, 7 Allen, 158; *Commonwealth v. Roxbury*, 9 Gray, 451.

It is apparent that the Legislature has not deemed it necessary to change the definition of great ponds in this Commonwealth, since they were defined in the Body of Liberties, as amended in 1649, as ponds containing more than ten acres of land. This is evident from R. L., c. 96, § 27, which provides: —

The provisions of this chapter relative to great ponds shall apply only to ponds which contain in their natural state more than ten acres of land, and shall be subject to any rights in such ponds which have been granted by the commonwealth.

This right of persons to have access to great ponds is further emphasized by chapter 91 of the Revised Laws, which provides in section 15 that —

The fishery of a pond, the area of which is more than twenty acres, shall be public, except as hereinafter provided; and all persons shall, for the purpose of fishing, be allowed reasonable means of access thereto.

R. L., c. 91, §§ 23, 24 and 25, provide as follows: —

SECTION 23. The riparian proprietors of any pond, the area of which is not more than twenty acres, and the proprietors of any pond or parts of a pond created by artificial flowing shall have exclusive control of the fisheries therein.

SECTION 24. A pond which is not more than twenty acres in area and is bounded in part by land belonging to a town or county shall become the exclusive property of the individual proprietors as to the fisheries therein only upon payment to the town treasurer, county commissioners or treasurer and receiver general of a just compensation for their respective rights therein, to be determined by three persons, one of whom shall be a riparian proprietor of said pond, one the chairman of the board of selectmen, if the rights of a town are in question, or of the county commissioners, if the rights of a county or of the commonwealth are in question, and one to be appointed by the commissioners on fisheries and game.

SECTION 25. Whoever, without the written consent of the proprietor, or lessee of a natural pond, the area of which is not more than twenty acres, or of an artificial pond of any size, in which fish are lawfully cultivated or maintained, takes any fish therefrom, shall forfeit not more than twenty-five dollars for each offence.

The effect of the foregoing sections is to cut off the right of the public to fish in great ponds twenty acres or less in area, where the pond is entirely surrounded by land of private riparian proprietors, and also in such ponds where the pond is entirely surrounded by private riparian owners and land belonging to towns or counties, when compensation has been paid in accordance with the provisions of section 24. These provisions in no way affect the rights of the public in relation to ponds in excess of twenty acres in area.

Thus, it is evident that, in the absence of some common land or public way, the public would in many cases be deprived of the benefit of the public reservation unless persons were enabled to gain access to the pond over land of private individuals without being deemed guilty of trespass.

In *Slater v. Gunn*, 170 Mass. 509, at p. 514, the court seems to construe that part of the colonial ordinance of 1649, providing that any man should be free to "pass and repass on foot through any man's propriety for that end, so they trespass not upon any man's corn or meadow," as limiting the right to passing and repassing to unimproved and unenclosed lands lying on the ponds.

It is to be observed, however, that the Legislature, by sections 14 and 15 of chapter 91 of the Revised Laws, has provided that the Commissioners on Fisheries and Game, in the discharge of their duties, may enter upon and pass through or over private property, and that all persons shall be allowed reasonable means of access to great ponds of more than twenty acres for the purpose of fishing, without rendering themselves liable as trespassers.

Accordingly, I am of the opinion that no permanent right of way can be established to a great pond for the benefit of the public except by prescription or action on the part of public

authorities. However, in my judgment, fishermen, hunters and possibly others may pass over uncultivated and unenclosed land bordering on a great pond, which is posted against trespass, provided there is no other reasonable means of access thereto, without being deemed guilty of trespass.

It is to be noted that where the ponds are of less than twenty acres in area and are entirely surrounded by land of private proprietors bordering thereon, the right to pass and repass over land of these proprietors for the purpose of fishing does not exist, for the reason that the right to fish in the ponds is exclusively in the proprietors.

I am also of the opinion that, under the provisions of sections 14 and 15 of chapter 91 of the Revised Laws, where there is no other reasonable means of access to great ponds of more than twenty acres, persons may in a reasonable manner pass over the land of proprietors bordering on such ponds, for the purpose of gaining access thereto for fishing, without rendering themselves liable as trespassers. It is my view that under the provisions of these sections passing over cultivated land is not reasonable when access can be obtained over uncultivated or unenclosed land.

CONSTITUTIONAL CONVENTION — CANDIDATES FOR DELEGATES — ARRANGEMENTS OF NAMES ON BALLOT.

The names of candidates for the office of delegate to the Constitutional Convention to be held under Gen. St. 1916, c. 98, § 9, should be arranged upon the ballot to be used at the election of such delegates, and at any primaries for the nomination of candidates to this office, alphabetically according to their surnames, and not in groups in the manner provided by St. 1913, c. 835, § 107, for the election of delegates to conventions at the primaries.

To the
Secretary.
1916
December 29.

Your letter requests my opinion as to whether the names of candidates for the office of delegate to the Constitutional Convention, to be held under the provisions of Gen. St. 1916, c. 98, should be arranged upon the ballot to be used at the election of such delegates, or at any primary which may be held under said act for the nomination of candidates for this office, alpha-

betically according to their surnames, in accordance with the provisions of St. 1913, c. 835, § 259, or whether such names should be arranged in groups in such order as may be determined by lot, in the manner provided by section 107 of said chapter 835 for the election of delegates to conventions at the primaries.

Gen. St. 1916, c. 98, § 9, provides that —

All laws relating to nominations and nomination papers, and to primaries, elections and corrupt practices therein, shall, so far as is consistent herewith, apply to the nomination of candidates for delegate to the convention, and to the primaries and special election provided for by this act.

St. 1913, c. 835, § 259, is as follows: —

The names of candidates for every state, city and town office, except the names of candidates for presidential electors, shall be arranged under the designation of the office in alphabetical order according to the surnames. . . .

Section 107 of said act, relating to the arrangement of names on the ballots to be used at the primaries, provides that —

Names of candidates for each elective office shall be arranged alphabetically according to their surnames.

Names of candidates for ward or town committees, and for delegates to conventions shall be arranged in groups in such order as may be determined by lot, under the direction of the secretary of the commonwealth. . . .

It is plain that the provision contained in the paragraph last quoted for the arrangement of the names of delegates to conventions in groups does not apply to primaries held for the nomination of delegates to the Constitutional Convention, for the reason that the primaries held under the general law are for the purpose of electing delegates to conventions, while under said chapter 98 of the General Acts of 1916 the primary is not for the purpose of electing the delegates but only for nominating them.

Furthermore, a grouping of the names of candidates for delegate to the Constitutional Convention would seem neither to

be contemplated by the act nor to be consistent therewith, for section 5 of that act provides that no party or political designation shall appear on said ballot.

Accordingly, I beg to advise that I am of the opinion that the names of delegates for the Constitutional Convention should be arranged alphabetically according to their surnames, both on the ballot to be used at the election and at such primaries, if any, as may be held for the nomination of such delegates.

INDEX-DIGEST.

ACCIDENT INSURANCE — Life Insurance — Two Classes in One Policy . . . 505
See INSURANCE. 8.

ADJUTANTS — Appointment of . . . 536
See MILITIA. 1.

AGE LIMIT — Civil Service . . . 133
See CIVIL SERVICE. 2.

AGRICULTURAL SOCIETIES — Bounties . . . 123
 Under R. L., c. 124, § 1, providing that certain agricultural societies may receive bounties from the Commonwealth if not within twelve miles from the grounds of another such society, the distances should be computed on the way of travel from one point to another.

AGRICULTURE, STATE BOARD OF — Prizes . . . 175
 Under Res. 1913, c. 96, the State Board of Agriculture has authority to issue prizes, in its discretion, for the best system of farm book-keeping and the best plan of a dairy barn.

2. — **Poultry Premium Bounty** . . . 222
 An incorporated poultry association is entitled, under St. 1909, c. 428, to receive aid from the Poultry Premium Bounty Fund for one annual exhibition only.
 Unincorporated associations are not entitled to receive aid from the Poultry Premium Bounty Fund.

ALIMONY — Annulment of Marriage . 176
See MARRIAGE.

ANNUITY CONTRACT — Issued by Savings Banks, Taxation of . 499
See TAXATION. 2.

ANNULMENT OF MARRIAGE — Alimony . . . 176
See MARRIAGE.

ARMORIES — Municipal Corporations . 537
 A dance or exhibition drill to be held by a military company in an armory of the first class which it occupies is not within the provisions of R. L., c. 102, § 173, prohibiting the carrying on of a public exhibition, show or amusement without a license from the mayor and aldermen of the city in which it is carried on.

ASSESSORS — Assistant — City of Boston — Civil Service . . . 172
See CIVIL SERVICE. 5.

ASSISTANT CLERK OF COURTS — Clerks *Pro Tempore* . . . 294
See CLERKS OF COURTS. 2.

AUTOMOBILES — Registration — "Owner" . . . 608
 Where an automobile has been sold under a conditional sale agreement whereby the vendor retains title for the purpose of security, the conditional vendee who has rightful possession is the owner within the meaning of St. 1909, c. 534, § 2, providing for the registration of motor vehicles by the owners thereof.

— Owned by the Commonwealth — Negligence of Chauffeur in the Employment of the Commonwealth — Personal Liability — Members of Boards or Commissions . . . 107
See COMMONWEALTH. 2.

— Regulation of Motor Vehicles engaged in Carrying Passengers for Hire . . . 422
See CONSTITUTIONAL LAW. 29.

BALLOT — Names of Candidates — Arrangement . . . 642
See CONSTITUTIONAL CONVENTION.

BANK — Use of Word by Trust Company . . . 190
See TRUST COMPANY. 2.

BIDS — Rejection of . . . 280
See CONTRACTS. 2.

BLACKSTONE — Town of — Taxes — Municipal Corporation . . . 534
See TAXES.

BOARD OF REGISTRATION IN PHARMACY — Registered Pharmacists — Hospitals . . . 143
See PHARMACY LAW. 2.

BOARDS OF HEALTH — Regulation of Private Sanatoria for Consumptives . . . 533
See CONSUMPTIVES.

BONDS — Names of Purchasers . . . 194
See TREASURER AND RECEIVER—
 GENERAL.

— Surety Companies — Renewals . . . 210
See SURETY COMPANIES.

— Guaranty of — Railroads — Consti-
 tutional Law . . . 276
See CONSTITUTIONAL LAW. 23.

— Tax Collectors — Right to discharge
 and accept New Bond . . . 445
See TAX COLLECTOR.

— Tax Collectors — Approval by Tax
 Commissioner . . . 540
See TAX COLLECTOR. 2.

**BOSTON, CAPE COD & NEW YORK
 CANAL COMPANY** — Deposit
 with State Treasurer . . . 285

Under St. 1899, c. 448, the deposit of
 \$200,000 with the State Treasurer as security
 for land damages cannot be applied to any
 other purpose or taken by virtue of an execu-
 tion.

2. — Jurisdiction of Joint Board —
 Safety Appliances — Comple-
 tion of Canal . . . 592

The jurisdiction of the Joint Board created
 by St. 1899, c. 448, § 6, to order the erection
 or installation of structures and appliances for
 the protection and use of the Cape Cod Canal,
 whatever its extent, was not a continuing one,
 but ended upon the original approval by it,
 as provided in that section, of the plans for the
 construction of the canal. St. 1910, c. 519,
 gave no additional authority in that regard.

The Public Service Commission, under the
 provisions of St. 1913, c. 784, now has exclusive
 jurisdiction of the regulation of the operation
 of the canal, and it alone is authorized to de-
 termine the equipment and appliances required
 for its safe operation.

Under the clause of the contract for the con-
 struction of the Cape Cod Canal, providing for
 the construction of tidal gates by the contrac-
 tor "if at the expiration of one year after the
 canal is opened to the public use" the Joint
 Board is satisfied that such gates should be
 constructed for the safe and suitable use of the
 canal, the Joint Board is authorized to make
 its determination within a reasonable time
 after the canal has been constructed to its full
 size and opened to public use for one year.

The Joint Board may issue its final certi-
 ficate of the completion of the canal under St.
 1900, c. 476, § 1, in the event that variations
 have been made in its construction from the
 plans originally approved by the Harbor and
 Land Commissioners under St. 1899, c. 448,
 § 4, only in case that it finds as a matter of
 fact that such changes are merely incidental
 and not matters of substance, or are required
 by the establishment of points of crossing
 under the provisions of section 6 of that statute,

**BOSTON, CAPE COD & NEW YORK
 CANAL COMPANY** — *Con-
 tinued.*

and that they do not change the general scheme
 or character of the canal approved by the Har-
 bor and Land Commissioners.

The regulation of the use of the draw in the
 railroad bridge over the canal is now entirely
 within the jurisdiction of the Public Service
 Commission, and the regulation of the use of
 the draw in the highway bridges is within the
 jurisdiction of the county commissioners of the
 county of Barnstable.

3. — Contract for Construction — Tidal
 Gates — Extra Work — Powers
 of Joint Board . . . 458

If the Joint Board created by St. 1899, c. 448,
 § 6, requires the construction of tidal gates or
 locks in the Cape Cod Canal, as authorized by
 the contract between the Boston, Cape Cod &
 New York Canal Company and the Cape Cod
 Construction Company, the latter is required
 to construct the same as additional work not
 covered by the price named in the contract,
 and is entitled to be paid therefor as additional
 work in accordance with the contract.

The approval by the Joint Board of a con-
 tract between the Boston, Cape Cod & New
 York Canal Company and the Cape Cod Con-
 struction Company for the construction of the
 Cape Cod Canal, by which the former agreed
 to pay the latter for such work substantially
 all the shares of stock and bonds which it was
 authorized to issue, was within the authority
 granted to the Board by St. 1900, c. 476, § 1.

The Joint Board has authority, notwith-
 standing the provisions of the contract be-
 tween these companies for the construction of
 tidal gates, to approve and certify the issue by
 the Canal Company of capital stock of the par
 value of \$5,990,000 and first mortgage bonds
 of the par value of \$6,000,000, — substantially
 the entire amount of stock and bonds which
 the company is now authorized to issue, —
 for work which does not include the construc-
 tion of such tidal gates or other similar devices.

**BOSTON CONSOLIDATED GAS
 COMPANY** — Contracts —

Constitutional Law . . . 272

St. 1906, c. 422, does not constitute a con-
 tract between the Commonwealth and the
 Boston Consolidated Gas Company, and the
 Legislature has authority to alter the provi-
 sions regulating the price of gas.

— Statutes — General and Special —
 Codification — Special Statute
 not repealed by Codification of
 General Statutes . . . 392
See STATUTES. 3.

**BOSTON ELEVATED RAILWAY
 COMPANY** — East Boston
 Tunnel — Tolls — Security for
 Bonds of City of Boston — Sub-
 stitution of Annual Appropria-

- BOSTON ELEVATED RAILWAY COMPANY** — *Continued.*
 tion — Impairment of Obligation of Contract . . . 33
See CONSTITUTIONAL LAW. 4.
- Locations and Right to maintain Elevated Structure — Revocation — Regulation of Use of Highway . . . 407
See CONSTITUTIONAL LAW. 27.
- BOSTON FINANCE COMMISSION** —
 Duty of Attorney-General to advise — Powers — Witnesses — Necessity of Summons — Right to Counsel and Stenographer — Powers of Mayor — Rules of Commission . . . 451
 The Boston Finance Commission has no power to require officials and employees of the city of Boston or of the county of Suffolk to come before it except by summons, though such officers and employees may individually waive summonses at any time, except that they may be required not to do so by a superior officer as to the hours when they are actually employed.
 Such witnesses are entitled to be represented by counsel, but they are not entitled to have a stenographer present, and a rule of the Boston Finance Commission limiting this right to be represented by counsel is not within its authority.
 The mayor of the city of Boston has no authority in any manner to limit the powers of the Boston Finance Commission.
 If an assistant corporation counsel of the city of Boston appears before the Boston Finance Commission as counsel of a person summoned before it at his request, the commission has no right to object.
2. — Authority to investigate Accounts of Clerk of Courts . . . 515
 Under St. 1909, c. 486, § 18, the Boston Finance Commission may investigate expenditures, accounts, etc., of the office of clerk of the Superior Court for Civil Business in Suffolk County.
- BOSTON TRANSIT COMMISSION** —
 Extension of Term of Office by Legislature . . . 259
 It is within the constitutional authority of the Legislature to extend the term of office of officers created by an act of the Legislature.
- BOTTLES** — Milk — Use for Other Purposes . . . 182
See MILK. 1.
- BOUNTIES** — Agricultural Societies . . . 123
See AGRICULTURAL SOCIETIES.
- BUILDING INSPECTORS** — District Police — Revocation of Certificate . . . 305
See DISTRICT POLICE. 2.
- BUILDING LAWS** — Employment of Labor . . . 347
 A building containing two or more establishments, each establishment employing less than ten persons but in the aggregate ten or more persons, comes within the provisions of St. 1913, c. 655, §§ 15 and 20.
- BUREAU OF STATISTICS** — Cities and Towns — Debt Limit — Emergency Appropriations . . . 134
See CITIES AND TOWNS. 2.
- BUSINESS** — Solicitation of — Regulation of Streets . . . 553
See CONSTITUTIONAL LAW. 32.
- BUSINESS CORPORATIONS** — Operation of Trackless Trolleys . . . 465
 Locations to maintain poles in public ways to be used in connection with the operation of a trackless trolley line cannot be granted by municipal authorities to a corporation formed under St. 1903, c. 437, commonly known as the business corporation act.
- CAPITAL STOCK** — Increase of — Filing Fees . . . 230
See CORPORATIONS. 2.
- CHAUFFEURS** — Police Officers — Labor . . . 158
See LABOR. 3.
- CHILDREN** — Dependent — Aid to Mothers — Power of Removal to Place of Settlement . . . 568
See PAUPER LAW.
- Of Veterans — Liability for Support . . . 613
See VETERAN. 3.
- CITIES AND TOWNS** — Regulation of Traffic — Vehicles — Massachusetts Highway Commission — Approval . . . 7
 An ordinance of a city regulating the use of the streets, sidewalks and highways therein, and relating to vehicles of all kinds, both "motor and horse-drawn," does not require the approval of the Massachusetts Highway Commission under the provisions of St. 1909, c. 534, § 17, that "the city council of a city . . . may make special regulations as to the speed of motor vehicles and as to the use of such vehicles upon particular ways, and may exclude such vehicles altogether from certain ways; provided, however, that no such special regulation shall be effective . . . until after the Massachusetts highway commission shall have certified in writing, after a public hearing, that such regulation is consistent with the public interests."
2. — Debt Limit — Emergency Appropriations . . . 134
 Under St. 1912, c. 45, § 1, it is the duty of the director of the Bureau of Statistics to de-

CITIES AND TOWNS — Continued.

termine whether certain appropriations of cities or towns are emergency appropriations within the provisions of St. 1913, c. 719, § 5, cl. 15.

3. — Public Documents . . . 212

Cities and towns have no authority to dispose of books, reports and laws which have been received from the Commonwealth under St. 1908, c. 142, §§ 1 and 2.

4. — Municipal Debts — Bonds and Notes . . . 261

A town or city has no authority to issue notes or bonds for the purpose of refunding sums of money previously raised and expended for municipal purposes.

5. — School Departments — Manual Training Schools — Liability for Accidents . . . 343

Cities and towns conducting manual training schools in compliance with law, and deriving no pecuniary benefit therefrom, are not liable in damages for injuries resulting to pupils from accidents, nor are school officers so liable except for their own wrongful conduct or negligence.

6. — Public Domain — Sales . . . 346

Land acquired for a public domain under St. 1913, c. 564, cannot be sold or used for any purpose not specified in the act without the authority of the Legislature.

Land acquired by a city or town for a public domain, and placed under the management of the State Forester, must be maintained at the expense of such city or town.

7. — Power to regulate Trade — Ice Cream . . . 390

Under the provisions of R. L., c. 56, § 70, as amended by St. 1912, c. 448, boards of health of cities and towns may, subject to the approval of the State Department of Health, make and enforce rules and regulations governing the manufacture, care and sale of ice cream.

8. — Wards — Division into Precincts — Time for Action . . . 468

Under St. 1913, c. 835, § 217, a city may not, after the first Monday of July in any year, make a division of any ward into precincts which shall become effective during that calendar year.

— Private Way — Width and Grade — Regulations — Constitutional Law . . . 15
See CONSTITUTIONAL LAW. 1.— Boards of Health — Rules and Regulations relating to the Keeping and Exposure for Sale of Articles of Food — Approval — Public Hearing — State Board of Health . . . 16
See STATE BOARD OF HEALTH. 1.**CITIES AND TOWNS — Continued.**

— Gypsy and Brown-tail Moth Suppression — Injury to Workmen — Compensation . . . 256
See WORKMEN'S COMPENSATION ACT.

CITIZENS — Labor — Public Works . . . 300
See LABOR. 5.**CITY CHARTERS — General Act authorizing Adoption or Amendment of . . . 337**
See CONSTITUTIONAL LAW. 25.**CIVIL SERVICE — Sealer of Weights and Measures . . . 127**

R. L., c. 62, § 18, is not repealed by St. 1909, c. 382, in so far as that section requires annual appointment of sealers and deputy sealers of weights and measures in cities and towns of over ten thousand inhabitants; and although such sealers and their deputies are protected by civil service laws from being lowered in rank or compensation or removed from office, the term of their office is not extended.

2. — Age Limit . . . 133

Under St. 1908, c. 375, § 1, a person above the age of fifty years is not eligible for appointment as inspector of factories and public buildings.

3. — Fire Department — Promotion . . . 151

Under St. 1913, c. 487, a call fireman is eligible to appointment as a member of the permanent force of firemen, under certain conditions, without being subject to civil service rules, but such call firemen cannot legally be promoted to the office of captain of such permanent force.

4. — Planning Board of the City of Boston . . . 153

St. 1913, c. 494, creating planning boards in cities and providing for appointments to such boards by the mayors, subject to approval by the council, does not repeal St. 1909, c. 486, § 9, requiring action by the Civil Service Commission on appointments in the city of Boston.

5. — Assistant Assessors of the City of Boston . . . 172

St. 1913, c. 484, requiring appointments of first assistant assessors in the city of Boston to be subject to civil service does not affect the provisions of St. 1894, c. 276, relating to assistant assessors other than first assistants.

6. — Sealer of Weights and Measures in Lowell . . . 213

The sealer of weights and measures in Lowell is not subject to civil service rules.

7. — Inspectors of Masonry Construction — Building Inspectors . . . 320

Under St. 1914, c. 540, it is the duty of the Civil Service Commissioners to certify for posi-

CIVIL SERVICE — Continued.

tions as inspectors of masonry construction only persons who have had practical experience as journeymen masons, but the provisions of this statute do not apply to a building inspector unless his principal duty is the inspection of masonry construction.

8. — Foremen and Inspectors — Vacancies . . . 322

Whenever the Civil Service Commission is required to certify a list of names of persons by reason of a vacancy in the position of foreman or inspector in any department, it must, when practicable, include the name of one person serving as a laborer or mechanic in such department.

9. — Superintendents of Engineering and of Commerce . . . 619

Appointments to the positions of superintendent of engineering and superintendent of commerce, created by Gen. St. 1916, c. 288, are not subject to the rules and regulations of the Civil Service Commission.

— State Board of Health . . . 298
See STATE BOARD OF HEALTH. 4.

— Stenographers and Clerks — Promotions — Increase of Salaries . 435
See STENOGRAPHERS AND CLERKS.

CLERKS OF COURT — Naturalization
Fees . . . 195

Clerks of court are entitled only to such portion of naturalization fees as is necessary for additional clerical assistance, travel and other expenses when acting under the naturalization act.

2. — Assistant Clerks — Clerks Pro Tempore . . . 294

Unless an assistant clerk of courts is appointed clerk *pro tempore* in the absence of the clerk, such assistant is not entitled to any increase in his regular salary.

— Authority of Boston Finance Commission to investigate Accounts of . 515
See BOSTON FINANCE COMMISSION. 2.

COLD STORAGE — Reports to State Department of Health . . . 564

The report required to be made to the State Department of Health by cold-storage companies by St. 1912, c. 652, § 2, should include a report of broken eggs as well as whole eggs.

Under St. 1912, c. 652, § 2, the State Department of Health may require cold-storage warehouses to report the number of pounds of articles of food placed in cold storage.

— Limit of Time for holding Articles of Food in . . . 1
See STATUTES.

COLD STORAGE EGGS — Sale at Retail upon Order — Delivery in Marked Container . . . 98
See EGGS.

— Sales in Storage — Interstate Shipments . . . 318
See EGGS. 2.

COLLATERAL LOAN COMPANY — Increase of Capital Stock — Commissioner of Corporations — Approval . . . 75

The Collateral Loan Company, which is a loan agency engaged in the business of making small loans, is a "corporation heretofore organized by special act of the legislature for a purpose or purposes for which corporations may be organized under the provisions of chapter four hundred and thirty-seven of the acts of the year nineteen hundred and three and acts in amendment thereof or in addition thereto," and is therefore within the provision of St. 1912, c. 586, § 1, that such corporations shall be subject to the provisions of St. 1903, c. 437, in respect to the amount of real or personal property which they may hold and may from time to time increase or decrease their capital stock in accordance with the provisions of such chapter.

The Commissioner of Corporations may, therefore, approve an increase of the capital stock of the Collateral Loan Company duly made in accordance with the requirements of St. 1903, c. 437, §§ 40, 41 and 42.

2. — Constitutional Law — Due Process of Law — Amendment of Charter . . . 541

It is within the constitutional power of the Legislature to amend the charter of the Collateral Loan Company by requiring it in the future to distribute for charitable purposes the excess of its profits over 8 per cent. and the net proceeds of the sale of unredeemed pledges above the amount of the loan after holding the same one year.

But an act requiring said corporation to turn over to charity the net proceeds of all sales of unredeemed pledges since 1875 above the amount of the loan, unclaimed for more than a year, would be unconstitutional.

COMMISSIONER OF CORPORATIONS — Inspection of Tax Returns . . . 221

Only such persons as may have occasion to inspect tax returns for the purpose of assessing or collecting taxes have a right to inspect tax returns of Massachusetts corporations.

COMMISSIONERS ON FISHERIES AND GAME — City and Town Clerks — Custody of Registration Books . . . 152

Books of hunters' certificates of registration should be retained by the respective city and town clerks, and the Commissioners on Fish-

COMMISSIONERS ON FISHERIES**AND GAME** — *Continued.*

eries and Game have no authority to demand their return.

2. — Expenses 204
Traveling expenses incurred on strictly official business, but no other expenses, may be allowed the Commissioners on Fisheries and Game.

COMMON CARRIERS —

Transportation of Express Matter and Freight by Street Railways — Regulations and Restrictions — Board of Railroad Commissioners — Approval 45

See STREET RAILWAYS. 1.

COMMONWEALTH — Employees —

Retirement — Head of Department — Chairman of Board or Commission 105

The chairman of a board or commission, consisting of three or more members appointed by the Governor, with the consent of the Council, for terms of years and receiving salaries from the Commonwealth, is not the head of a department within the meaning of St. 1911, c. 532, § 3, par. (4), providing that "any member who reaches the age of sixty years and has been in the continuous service of the commonwealth for a period of fifteen years immediately preceding may retire or be retired by the board of retirement upon recommendation of the head of the department in which he is employed . . ."

2. — Automobiles owned by — Negligence of Chauffeur in the Employment of — Personal Liability — Members of Boards or Commissions 107

Where an automobile is under the care and control of a state board or commission or the members thereof and is used by such commission or by its members or executive officers or agents, with the consent of the commission, for the purpose of traveling upon official business, such commission or members, officers or agents are not personally liable for injury caused by such automobile to persons or property through the negligent conduct of the chauffeur if such commission, members or officers or agents at the time of using such automobile are engaged in the proper performance of their official duties and are not themselves negligent or otherwise at fault in their direction of such chauffeur in such a manner as to contribute to the cause of the injury.

3. — Land and Buildings belonging to State Hospital — Trustees — Exclusion of Public from Use of Land 112

The Board of Trustees of the Worcester State Hospital have the right to prevent persons from entering upon the property of the Common-

COMMONWEALTH — *Continued.*

wealth devoted to the purposes of such hospital for any purpose for which such persons are not authorized by law to enter upon the premises, and if, in the judgment of such trustees, it is for the best interest of such institution that the public, unless entering for certain specified purposes, should be excluded from the land and buildings belonging thereto, they are authorized to exclude it.

4. — Damages — Liability of, to Riparian Proprietors 232

A riparian proprietor who is damaged by the construction of a bridge which cuts off his access to the sea has no right of action against the Commonwealth.

— Laborers, Workmen and Mechanics 590
See WORKMEN'S COMPENSATION ACT. 2.

COMMONWEALTH PIER —

Old Colony Railroad Company — Lease — Cancellation — Directors of the Port of Boston — Agreement — Execution — Date 11

Where the Directors of the Port of Boston, acting under the authority of St. 1911, c. 748, §§ 4 and 5, executed a contract with the Old Colony Railroad Company, and its lessee, the New York, New Haven & Hartford Railroad Company, by which an existing lease to the Old Colony Railroad Company from the Board of Harbor and Land Commissioners of the Commonwealth Pier at a quarterly rental of \$17,500 was cancelled, and it was provided that the Old Colony Railroad Company and its lessee should be absolved and discharged from any further obligation or promises under or by virtue of said lease, except the payment of any unpaid rent up to July 1, such agreement being dated "this first day of July, 1912," but not executed in fact until Oct. 10, 1912, the agreement so drawn and executed was effectual to relieve the lessee of the obligation to pay rental for the period of the continuance of the lease after July 1, and the Old Colony Railroad Company or its lessee may justly claim that the rental paid for the months of July and August should be reimbursed to it in accordance with the terms of such agreement.

In view of the fact that the payment was required to be made by force of an existing lease, it may be doubted whether such reimbursement should be made without express authority from the Legislature.

— Intrastate Shipments — Alleged Discrimination in Rates by Railroad 478
See PUBLIC SERVICE COMMISSION.

COMMUTATION OF LIFE SENTENCE —

Governor 119
See CONSTITUTIONAL LAW. 8.

CONSTITUTIONAL CONVENTION —

Candidates for Delegates — Arrangement of Names on Ballot . 642

The names of candidates for the office of delegate to the Constitutional Convention to be held under Gen. St. 1916, c. 98, § 9, should be arranged upon the ballot to be used at the election of such delegates, and at any primaries for the nomination of candidates to this office, alphabetically according to their surnames, and not in groups in the manner provided by St. 1913, c. 835, § 107, for the election of delegates to conventions at the primaries.

CONSTITUTIONAL LAW — Cities and

Towns — Private Way — Width and Grade — Regulation . 15

The term "private way" in its technical sense imports a way laid out under the provisions of R. L., c. 48, § 65, and the following sections, and is, in fact, a public way laid out by public officers for the common necessity and convenience; and the Legislature may authorize a city or town to make ordinances or by-laws controlling the construction of such ways with respect to width and grade. Upon the other hand, a way over private land in which the public has no interest cannot be regulated and controlled as to width or grade by the ordinances of a city or the by-laws of a town.

2. — Hours of Labor — Fair, Reasonable and Appropriate Exercise of Police Power — Question of Fact . 20

The constitutionality of a proposed measure limiting the hours of labor of persons employed in certain designated occupations depends upon the determination of the question whether such measure, if enacted, would constitute a fair, reasonable and appropriate exercise of the police power upon the one hand, or an unreasonable, unnecessary and arbitrary interference with the right of the individual to his personal liberty to make such contracts as he deems necessary or proper upon the other.

In the absence of evidence bearing upon the relation which exists between the occupations so designated and the health of those employed in them, the Attorney-General is not sufficiently advised to pass upon the question of the constitutionality of such proposed measures as a question of law.

It is for the Legislature, in the first instance, to determine upon the facts and considerations presented to it, — whether in its judgment there is fair and reasonable ground to say that there is material danger to the public health or to the health of the employees if the hours of labor in the occupations designated are not curtailed.

3. — Sale of Fruit, Vegetables and Nuts at Retail by Dry Measure — Legal Weight . 27

The provision of R. L., c. 57, § 21, as amended by St. 1912, c. 246, that "all fruits, vegetables and nuts, . . . shall be sold at re-

CONSTITUTIONAL LAW — Continued.

tail by dry measure, weight or by numerical count, and all fruits and vegetables for which a legal weight has been established shall be sold at retail only by weight or numerical count," may constitutionally be amended so as to provide that "all fruits, vegetables and nuts for which a legal weight has been established shall be sold at retail only by dry measure, weight or numerical count, but not less than the legal weight shall be given when the same are sold by dry measure."

If such proposed amendment was enacted, a purchaser buying by dry measure would be entitled to receive the established legal weight of the commodity purchased so far as a specific weight per unit of dry measure was established by law therefor, and the dealer would be required to ascertain that the weight for such commodity as measured did not fall below the weight required by law in the case of the unit of dry measure employed in such sale.

4. — Boston Elevated Railway Company — East Boston Tunnel — Tolls — Security for Bonds of City of Boston — Substitution of Annual Appropriation — Impairment of Obligation of Contract . 33

A proposed bill providing that "the city of Boston is hereby authorized to appropriate from the tax levy each year . . . the sum of one hundred and twenty-five thousand dollars to be added to the rental received from the Boston Elevated Railway Company for the lease of the East Boston tunnel, the sum total of which shall be used to provide for the payment of the interest and sinking fund requirements of the bonds issued for the construction of the East Boston tunnel," in so far as it requires that such appropriation shall be used for a purpose which amounts to an indirect abolition of such tolls in a manner not necessarily in accordance with the provisions of St. 1897, c. 500, § 17, that the city of Boston shall collect from each person passing through such tunnel in either direction a toll of one cent, to be used with other funds to meet the interest and sinking fund requirements of bonds issued by the city of Boston to defray the cost of constructing such tunnel unless such tolls are abolished or diminished by the Board of Railroad Commissioners in the manner and for the reasons set forth in said section, if enacted would be unconstitutional and void as impairing the obligation of the contract created by such section.

5. — Legislature — Delegation of Legislative Power — Act creating Judicial District — Submission to Voters of District — Right to require Opinion of Justices of Supreme Judicial Court — Important Question of Law . 41

The Legislature may constitutionally enact a statute providing that the county of Nan-

CONSTITUTIONAL LAW — Continued.

tucket shall constitute a judicial district under the jurisdiction of a court to be called the district court of Nantucket and that the act "shall be submitted to the voters of the county of Nantucket at the annual state election in the current year, and if accepted by a majority of the voters voting thereon it shall take effect immediately so far as the appointment and qualifying of the justices of the court are concerned, and for the remainder of the act it shall take effect on the first day of January in the year nineteen hundred and fourteen."

It is doubtful if an inquiry as to the power of the Legislature to enact a statute which shall take effect upon acceptance by a majority of the voters in such district voting thereon presents such an important question of law as could authorize a request for an opinion of the justices of the Supreme Judicial Court.

6. — Flats — Cultivation of Food and Bait Mollusks — Grant from the Commonwealth to Private Individuals of Right to control Area between High and Low Water Mark — Eminent Domain 48

A proposed bill to authorize the Commissioners on Fisheries and Game, acting in behalf of the Commonwealth, to grant a license for not more than fifteen years to any inhabitant of the Commonwealth to plant, grow and dig mollusks or to plant shells for the purpose of catching mollusk seed upon and in any territory below mean high water mark which contemplates not only the granting of the exclusive right to take shellfish for such period and to plant and grow mollusks and plant shells for the purpose of catching mollusk seed upon the area defined in such license, but also the entire exclusion of the owner, where such flats are subject to private ownership, from any use or occupation of such flats by inclosure or filling, cannot be justified as the imposition, under the police power, of a reasonable regulation, limitation or restraint in the use and enjoyment of property to prevent the same from being injurious to others, and constitutes so material an interference with existing rights of property in such areas as to amount to an exercise of the power of eminent domain without due provision for compensating the owner of the property taken, and such bill, if enacted, would therefore be unconstitutional and void.

7. — Appointment of Executive or Administrative Board or Commission — Confirmation by Justices of Supreme Judicial Court 53

A proposed act which provides that members of a commission established to conserve a water supply of a city shall be appointed by the mayor of said city and that such appointment shall be confirmed by the justices of the Supreme Judicial Court where the commission so appointed is an executive or administrative department of the municipality and performs

CONSTITUTIONAL LAW — Continued.

no duty properly incidental to the administration of justice in or by the courts, if enacted would be unconstitutional and void.

8. — Governor — Commutation of Life Sentence 119

The Governor has constitutional authority, with the advice of the Council, to commute sentences of life imprisonment to imprisonment for a term of years.

9. — Justice of the Peace — Notary Public 124

An act providing that "all members of the Massachusetts bar are hereby made justices of the peace and notaries public" would be unconstitutional.

10. — Liberty of the Press — Arrests for Drunkenness — Publication of Names 135

A law which forbids the publication of the name of a person arrested for drunkenness would be unconstitutional.

11. — Newspapers 138

A law to prohibit contracts by publishers appointing local sole agents for the sale of periodicals would be unconstitutional.

12. — Cities and Towns — Ice 160

A law enacted by the Legislature authorizing cities and towns to cut, store and sell ice from reservoirs and ponds owned or controlled by such cities and towns would be unconstitutional, and may not acquire or hold property for such purposes.

13. — Liberty of the Press — Publication of Names of Drugs taken with Suicidal Intent 178

A law prohibiting the publication of the name of any drug, chemical, etc., taken with suicidal intent would be unconstitutional as interfering with the liberty of the press.

14. — Highways — Licensing of Motor Vehicles in Towns by Selectmen 183

A law prohibiting the operation of motor vehicles in a town without a license from the selectmen is constitutional.

15. — Taxation of Industries — Exemptions 192

A law exempting manufacturing property from taxation for a term of years, when authorized by local authorities, would be unconstitutional.

16. — Grade Crossings — Powers of Legislature 199

The Legislature has authority to fix the time for the filing of a report by a grade crossing commission.

CONSTITUTIONAL LAW — Continued.

17. — Regulation of Sale of Tickets to Places of Amusement . . . 207

It is not within the constitutional power of the Legislature to provide regulations for the sale of tickets to places of amusement.

18. — Trading Stamps — Excise Tax — License Fees . . . 215

A law requiring the payment of a license fee of \$6,000 per annum by any firm furnishing trading stamps with any sale of goods would be unconstitutional.

19. — Corporations — Rights of Minority Stockholders . . . 240

A law requiring foreign corporations doing business in Massachusetts to give minority stockholders representation on their boards of directors would be unconstitutional.

20. — Eminent Domain — Interstate Streams . . . 244

A law authorizing a city in this Commonwealth to take water from an interstate stream, and providing compensation for damages to non-residents, is constitutional.

21. — Freedom of Contract — Plumbers 252

A law providing that permits to perform plumbing work shall be issued only to master plumbers, and that all work done under such permits shall be performed only by master plumbers or their designated journeymen plumbers, would be unconstitutional.

22. — Great Ponds — Regulation of the Price of Ice . . . 265

A law authorizing a commission to fix the price at which ice shall be sold when such ice has been taken from great ponds of the Commonwealth, or from bodies of water under the control of such commission, would be constitutional.

23. — Railroads — Guaranty of Bonds . 276

It is within the constitutional authority of the Legislature to provide that the Commonwealth shall guarantee bonds of a railroad company.

24. — Railroads — Regulation of Compensation of Employees . . . 282

It is not within the constitutional power of the Legislature to compel railroads to give certain employees two days' rest in a month with full compensation.

25. — Cities — Charters — General Act 337

The Legislature has no authority to enact a general municipal corporation act giving cities the right to adopt one of several forms of charter, without further special legislative enactment.

Authority to legislate so as to amend a city charter cannot be granted to a city.

It is within the power of the Legislature to enact a general act giving cities the right to

CONSTITUTIONAL LAW — Continued.

change, alter, consolidate, create or abolish departments without special legislation in each particular instance.

The Legislature has power to authorize a city to choose by vote between two or more charters, and may provide that a form of charter once adopted shall remain in force for a fixed term of years.

26. — Freedom of Contract — Police Power — Regulation of Sale of Newspapers and Periodicals in Combination . . . 386

A proposed act declaring illegal any agreement by news dealers, news agents and publishers which provides for the sale of two or more newspapers or periodicals only in combination with each other, or unless offered separately at the current price, would be unconstitutional if enacted, as denying the equal protection of the law in violation of the Fourteenth Amendment to the Constitution of the United States and as not being a reasonable regulation in the interests of the public health, safety, morals or general welfare under the police power.

27. — Boston Elevated Railway Company — Locations and Right to maintain Elevated Structure — Revocation — Regulation of Use of Highway . . . 407

A proposed act requiring the Boston Elevated Railway Company to "remove and forever discontinue the use of that part of its elevated structure which extends from the junction of Washington and Castle streets to the entrance of the old Tremont street subway in the city of Boston" at its own expense would be unconstitutional, if enacted.

St. 1894, c. 548, incorporating the Boston Elevated Railway Company and authorizing it to construct and operate lines of elevated railway upon certain specific locations, and particularly section 19 thereof, providing that "the locations of or right to maintain any elevated lines or structures of the Boston Elevated Railway Company shall not be subject to revocation except" as prescribed in P. S., c. 112, §§ 7 and 8, constitutes a contract between that company and the Commonwealth that, at least for a period of twenty-five years, these locations and the right to maintain elevated lines and structures thereon shall not be revoked.

So much of such proposed act as applies to the structure located across the right of way of the Boston & Albany Railroad and the New York, New Haven & Hartford Railroad Company would, if enacted, be unconstitutional as taking property without compensation.

The requirement of the proposed act, that the Boston Elevated Railway Company shall remove the entire structure described therein at its own expense and without compensation, is not a reasonable police regulation in the interest of the public health, safety or morals.

It is within the power of the General Court

CONSTITUTIONAL LAW — Continued.

to determine that the Boston Elevated Railway Company has discontinued the use of that portion of the structure described in the proposed act which is within the limits of public ways; that it unreasonably interferes with the use of these ways by the public, and, by proper legislation, to require that company to remove it at its own expense and without compensation.

28. — Religious Belief of Public School Teachers — Bill forbidding Inquiry by School Officials . . . 418

A provision of a proposed act making it "unlawful for any public school committee or superintendent or supervisor of public schools to require or solicit from an applicant for a position in the public schools any information as to the religious belief or practice of the applicant" is not unconstitutional as inconsistent with Article II. of the Declaration of Rights, declaring "it is the right as well as the duty of all men in society, publicly, and at stated seasons, to worship the SUPREME BEING, the great Creator and Preserver of the universe," as that declaration is merely a precept for the guidance of the people and their legislators in the performance of their public duties, and not a limitation on the power of the General Court.

A provision of a proposed act making it "unlawful for any public school committee or superintendent or supervisor of public schools . . . to furnish any information as to the religious belief or practice of any applicant for a position in any public school" would be unconstitutional if enacted, as it covers statements made outside of official duties, and thus denies to the officers referred to the equal protection of the laws.

If from this proposed act the words "or to furnish any information as to the religious belief or practice of any applicant for a position in any public school" be struck out, and the words "and no appointment to such position shall be affected by political or religious opinions or affiliations" inserted, as thus amended it is not beyond the constitutional power of the General Court.

29. — Regulation of Motor Vehicles — Classification — Requirement of a Bond . . . 422

A proposed act requiring every person, firm or corporation engaging in the business of carrying or transporting passengers for hire in any motor vehicle to obtain a license from municipal authorities and to give a bond conditioned to pay any judgment obtained against the licensee for injury to person or property by reason of acts of the licensee in the conduct of such business, and then exempting from the provisions of such act persons operating motor taxicabs or motor vehicles rented by the day or hour and also any person, firm or corporation engaged principally in the hotel business, who operate motor vehicles to transport guests to and from railroad stations, would be unconstitutional if enacted.

CONSTITUTIONAL LAW — Continued.

30. — Members of the General Court — Masters in Chancery . . . 457

A master in chancery is not a "judge of any court of this commonwealth" within the meaning of Article VIII. of the Amendments to the Constitution, and there is no constitutional objection to the appointment of a member of the General Court to that office.

31. — Taxation — Public Purpose — Construction of Dry Dock . . . 483

The construction and operation of a dry dock in Boston Harbor by the Commonwealth in accordance with St. 1911, c. 748, and Spec. Acts, 1915, c. 335, is a public purpose for which money may be raised by taxation, and is not in violation of Article X. of the Declaration of Rights.

32. — Regulation of Streets — Solicitation of Business on . . . 553

Senate Bill No. 482, making it an offense to solicit any one other than an acquaintance upon any public sidewalk in front of a retail store, other than one in which the solicitor is interested, to purchase at another store goods similar in kind to any kept or displayed in such store would be constitutional, if enacted, as being a reasonable regulation of the use of the highways. See Gen. St. 1916, c. 289.

— Boston Transit Commission — Extension of Term of Office . . . 259
See BOSTON TRANSIT COMMISSION.

— Contracts — Boston Consolidated Gas Company . . . 272
See BOSTON CONSOLIDATED GAS COMPANY.

— Salem Fire — Authority of Legislature to grant Relief . . . 289
See LEGISLATURE. 2.

— Eminent Domain — Salisbury Beach . . . 516
See EMINENT DOMAIN.

— Police Power — Regulation of Sale of Theatre Tickets . . . 519
See THEATRE TICKETS.

— Police Power — Deductions from Employee's Pay . . . 521
See POLICE POWER.

— Corporations — Regulation of Sale of Theatre Tickets . . . 529
See THEATRE TICKETS. 2.

— Due Process of Law — Amendment of Charter — Collateral Loan Company . . . 541
See COLLATERAL LOAN COMPANY. 2.

— Police Power — Power of State to prohibit the Use of Trading Stamps . . . 557
See TRADING STAMPS.

CONSUMPTIVES — Boards of Health
— Regulation of Private Sanatoria for Consumptives . . . 533

While local boards of health may not control or regulate the manner of treatment of consumptive patients in private sanatoria, they may, under the provisions of R. L., c. 75, § 42, as amended by St. 1906, c. 365, order all the patients therein removed to such other hospital or place of reception as they provide.

CONTRACTS — Public Works — Labor 278

The provisions of St. 1914, c. 474, regulating wages of employees on public works, do not apply to contracts made prior to the taking effect of the statute.

2. — Bids — Right of Rejection . . . 280

Where a public commission, in advertising for bids on a proposed contract, reserves the right to reject any and all bids, no liability attaches in case any of the lowest bids are rejected.

— Constitutional Law — Boston Consolidated Gas Company . . . 272
See BOSTON CONSOLIDATED GAS COMPANY.

— Corporations — Typewritten Signature — Tests of Samples . . . 130
See CORPORATIONS. 1.

— Plumbers — Permits for Work — Freedom of Contracts . . . 252
See CONSTITUTIONAL LAW. 21.

— Change of, by Highway Commission 311
See MASSACHUSETTS HIGHWAY COMMISSION.

CONVICTION — Crime against Laws of Commonwealth — Violation of Traffic Regulations . . . 490

A person convicted of allowing his automobile to remain standing on a public highway in Boston for more than twenty minutes in violation of a traffic regulation established by the board of street commissioners of that city has not been convicted of a crime against the laws of the Commonwealth within the meaning of R. L., c. 19, § 17.

— Appeal — License — Intoxicating Liquor . . . 157
See INTOXICATING LIQUOR. 2.

CO-OPERATIVE BANKS — Loans — Reduction of Rate . . . 335

A co-operative bank authorized by its by-laws to dispense with offering its money for bids, and in lieu thereof to loan money at not less than 5 per cent., as fixed by its directors, may reduce the rate of interest to any rate not less than 5 per cent. to a borrower who applied for and received a loan at a rate fixed by the board of directors when the loan was made.

CO-OPERATIVE BANKS — *Continued.*

2. — Loans to Shareholders — Matured Shares . . . 388

A co-operative bank is not authorized to execute loans to shareholders on matured shares held in accordance with St. 1912, c. 623, § 17, as amended by St. 1914, c. 643, § 6.

CORPORATIONS — Contracts — Type-written Signature — Tests of Samples . . . 130

A typewritten signature of a corporation by a duly authorized agent to a proposal for a contract is valid.

In case of doubt in the construction of a contract, reference may be had to the specifications as an aid in ascertaining the intention of the parties.

Where a contract for the sale of coal of a certain grade provides that samples "will be taken until the total quantity amounts to about 1,000 pounds, and shall represent not more than 500 tons of coal," and the samples are thus taken on deliveries of any part of 500 tons, if the coal thus tested is below the standard, penalties may be exacted as the contract provides.

Where penalties are exacted under a contract for the sale of coal, of 1 per cent. in price for every 1 per cent. below the Thermal Unit analysis specified, the per cent. (including fractions) of price decrease exactly equaling the per cent. of deficiency, must be calculated.

2. — Increase of Capital Stock — Filing Fees . . . 230

Corporations must pay a filing fee of one-twentieth of one per cent. on all increases of capital stock, and every increase and decrease must be separately considered.

— Domestic Business Taxation — Distribution of Tax — Canal Company — Corporation having the Right to take or condemn Land — The Essex Company . . . 82
See TAXATION. 1.

— Mercantile — Business of Pharmacy — Lease of Floor Space to Registered Pharmacist — Ownership of Stock in Trade . . . 109
See PHARMACY LAW.

— Rights of Minority Stockholders . . . 240
See CONSTITUTIONAL LAW. 19.

— Business — Grant of Location to, for Trackless Trolleys . . . 465
See BUSINESS CORPORATION.

— Domestic, Deduction for the Purposes of Taxation . . . 555
See TAXATION. 4.

COUNTY COMMISSIONERS — Expenses — Controller of County Accounts . . . 302

County commissioners may be allowed as reimbursement for expenses, under St. 1911, c. 162, only such sums as are expended in the performance of official duty, whether within or without the Commonwealth, if such expenses are reasonable and proper in amount.

DAMAGES — Liability of Commonwealth to Riparian Proprietors 232
See COMMONWEALTH. 4.

DEATH CERTIFICATE — Registered Osteopath . . . 406
See OSTEOPATH.

DECREE — United States District Court, Compliance with — New York, New Haven & Hartford Railroad Company . . . 368
See NEW YORK, NEW HAVEN & HARTFORD RAILROAD COMPANY.

DEEDS — Restrictions — Mercantile Purposes . . . 323
See METROPOLITAN PARK COMMISSION.

DEER — Carcass of — Property . . . 512
The carcass of a deer, killed under the provisions of St. 1913, c. 529, § 1, as amended by St. 1914, c. 453, by a farmer or other person upon land owned by him, becomes the property of the person so killing, although it cannot be sold by him.

DENTISTRY — Candidate for Registration — Educational Requirements . . . 550

A candidate for registration in dentistry is eligible for examination or re-examination after June 1, 1916, even though he has not the educational requirements prescribed by Gen. St. 1915, c. 301, § 5, provided that such candidate had applied for examination and paid his examination fee before this section took effect.

DEPOSITORS IN SAVINGS BANKS — Form of Deposits — Accounts Payable only to Persons Other than Depositor . . . 437
See SAVINGS BANKS. 3.

DIRECTORS OF THE PORT OF BOSTON — Time devoted to Work . . . 307

Under St. 1914, c. 712, each member of the Directors of the Port of Boston is required to devote the regular working hours of every working day to the work of the Board.

2. — Powers — Construction of Dry Dock . . . 361

St. 1911, c. 748, § 5, providing that the Directors of the Port of Boston "may lay out and build . . . such piers, with buildings and ap-

DIRECTORS OF THE PORT OF BOSTON — *Continued.*

purtenances, docks, highways, waterways, railroad connections, storage yards and public warehouses as, in the opinion of the directors, may be desirable," did not authorize them to enter into contracts for the construction of a dry dock substantially as described in the report of the Directors for the year ending Nov. 30, 1913, the final decision as to whether such a dry dock should be built having been reserved to itself by the General Court.

3. — Wrecks — Authority to remove . . . 449

The Directors of the Port of Boston, within the territory entrusted to their charge, have the powers granted to the Board of Harbor and Land Commissioners by R. L., c. 97, §§ 15-23, inclusive, concerning the removal of wrecks, and are authorized to expend such sums as are reasonably necessary to carry out the provisions of that statute.

4. — Powers — License to build Structure in Tide Waters — City of Boston . . . 486

The Directors of the Port of Boston have authority, with the approval of the Governor and Council, under R. L., c. 96, as amended by St. 1911, c. 748, § 4, to license the building by the city of Boston of a structure within the boundary of the property granted to it by Spec. Acts, 1915, c. 326.

DISCHARGE — Insane Persons . . . 586
See INSANE HOSPITALS.

DISCRIMINATION IN RATES — By Railroad — Commonwealth Pier — Intrastate Shipments . . . 478
See PUBLIC SERVICE COMMISSION.

DISEASES DANGEROUS TO PUBLIC HEALTH — Notice to Commonwealth in Cases of Persons without Settlements . . . 474
See STATE BOARD OF HEALTH. 6.

DISTRICT POLICE — Transfer to Board of Labor and Industries — Retransfer . . . 117

St. 1913, c. 610, § 1, providing for appointment by the Governor in case of vacancies in the two inspection departments of the District Police, did not repeal St. 1913, c. 424, § 1, permitting inspectors of factories and public buildings of the District Police who were transferred to the State Board of Labor and Industries from being transferred to the building department of the District Police to fill vacancies, upon their request.

2. — Building Inspectors — Revocation of Certificates . . . 305

Certificates of the proper equipment of buildings, issued under St. 1913, c. 655, § 25, may be revoked by the inspector for the district where said buildings are located, whether such inspector issued the original certificate or not.

DIVORCE CERTIFICATE — Marriage License . . . 223

The certificate of divorce or certified copy of such record required to be filed with town or city clerks, under St. 1912, c. 535, need not be in the English language.

DRUG STORES — Corporations . . . 170
See PHARMACY LAW. 1, 3.**DRY DOCK** — Construction of — Directors of the Port of Boston — Powers . . . 361
See DIRECTORS OF THE PORT OF BOSTON. 2.
Taxation — Public Purpose . . . 483
See CONSTITUTIONAL LAW. 31**EDUCATION, STATE BOARD OF** — Transportation of Pupils — "Preceding Year" defined . . . 159

Where towns or cities, under St. 1913, c. 396, are required to provide transportation for high school pupils attending school in other towns or cities, the statute is not to be construed as authorizing towns to provide for board for such pupils.

Under this chapter, the words "the preceding year" refer to the fiscal school year as used in St. 1913, c. 356.

2. — Residence of Minors for School Purposes . . . 166

The word "residence," under St. 1911, c. 471, § 7, relating to applicants for admission to an industrial, agricultural or household arts school, means the actual residence of such applicants.

3. — Textile Schools . . . 264

The Commissioner of Education has statutory powers over all educational work supported in whole or in part by the Commonwealth, including textile schools.

4. — Framingham Normal School — Laundry . . . 304

A resolve providing for the erection and furnishing of a dormitory in a normal school does not authorize the equipment of a laundry.

5. — Superintendency Union — Towns 323

Under St. 1914, c. 556, only such towns as are required to join a superintendency union are required to belong to such a union.

— Positions for Teachers . . . 578
See TEACHERS. 3.**EDUCATIONAL INSTITUTIONS** — Charitable Corporations — Returns . . . 352

Although an institution for the education of the deaf may be essentially an educational institution, it may also be a charitable institution within the meaning of St. 1903, c. 402, and thereby be required to make an annual report to the State Board of Charity.

EGGS — Cold Storage — Sale at Retail upon Order — Delivery in Marked Container . . . 98

The provision of St. 1913, c. 538, § 1, that "whenever eggs that have been in cold storage are sold at retail, or offered or exposed for sale, the basket, box or other container in which the eggs are placed shall be marked plainly and conspicuously with the words 'cold storage eggs,'" requires that the basket, box or other container in which such eggs are placed when delivered by a retail dealer to a consumer, upon orders taken at the home of the consumer, or by telephone, where such consumer does not have an opportunity to see such eggs in a marked container at the store, shall be marked with the words "cold storage eggs."

2. — Sales in Storage — Interstate Shipments . . . 318

Under St. 1913, c. 538, as amended by St. 1914, c. 545, eggs which are in cold storage when sold, and which are to remain until called for by the purchaser, need not be marked until withdrawn from storage.

Cold storage eggs withdrawn for sale for consumption within the State or for export are required to be marked, under the statute.

— Sale of, Unfit for Food — Statute — Construction of Contradictory Provisions — Prohibition . . . 58
See STATUTES. 2.**ELECTRICIANS** — Licensed — Licensed Journeymen — Right to do Contract Work — Employment of Learners or Apprentices . . . 496

A journeyman electrician duly licensed under Gen. Acts, 1915, c. 296, has the right, by contract or otherwise, to do the same class of work as is done by master electricians, provided that he does the work with his own hands and does not employ any journeyman to assist him, and he may in such work employ learners or apprentices working with him and under his direct personal supervision.

2. — Master's Certificate — Examination . . . 631

A "master electrician's certificate" cannot be granted to a person, firm or corporation upon the examination of one who is merely an employee of such person, firm or corporation. But if the applicant for such a certificate is a person, the examination must be taken by him personally; if a firm, by a member of the firm; or if a corporation, by an officer of the corporation.

EMINENT DOMAIN — Constitutional Law — Salisbury Beach . . . 516

The power of eminent domain can be exercised only for a public purpose and therefore Senate Document No. 184, entitled "An Act to make Salisbury Beach a public reservation," would be unconstitutional if enacted, since section 10 of this act authorizes the leasing or sale of parts of the land so taken "which are not needed as a public reservation."

EMINENT DOMAIN — *Continued.*

— Interstate Streams . . . 244
See CONSTITUTIONAL LAW. 20.

EMPLOYEES — Damage to Employer

— Fines . . . 344
See LABOR. 6.

— Number in One Building . . . 347
See BUILDING LAWS.

EMPLOYEE'S PAY — Deductions from

— Constitutional Law — Police
 Power . . . 521
See POLICE POWER.

EMPLOYMENT CERTIFICATE —

Children under Sixteen Years of
 Age — Fees . . . 102
See SCHOOLS. 1.

ENGINEERING AND COMMERCE —

Superintendents of . . . 619
See CIVIL SERVICE. 9.

ENGINEERS — Firemen — Special License — Employment — Vacations

Under St. 1911, c. 562, § 8, a special license issued to an engineer or fireman before the passage of the act becomes null and void whenever the holder ceases to be employed on the plant specified in said license.

Under this section, the words "ceases to be employed" mean a complete severance from one's employment, and not absences on a vacation, or on account of illness or leave of absence.

EXECUTIVE COUNCIL — Powers —

Removal of Public Officer — No
 Right to reconsider Removal
 after Appointment and Qualifi-
 cation of Successor . . . 381

The Executive Council has no power on its own initiative to reopen or in any manner revise the matter of the removal by the Governor of the Commissioner of Animal Industry, with the advice and consent of the Council, during the previous political year and after the appointment and qualification of his successor, assuming that removal to have been legal.

In such a case the Executive Council cannot properly, on petition of the person thus removed, hear or consider any evidence bearing upon the charges made against him at the time of his removal, whether that evidence was then heard or not.

The Executive Council has no power to reconsider the consent given by it to an appointment to public office by the Governor after the appointee has duly qualified as such public officer, whether that consent was given during the term of the councillors then in office or that of their predecessors.

EXPENDITURE — Of Public Money

for Construction of Dry Dock . . . 483
See CONSTITUTIONAL LAW. 31.

EXTRADITION — Governor — Power

to revoke Executive Warrant . . . 438

It is within the power of Governor to revoke an executive warrant issued in the matter of interstate rendition at any time before the fugitive has actually been removed from the limits of the Commonwealth.

FEDERAL LICENSE — Pilots — Effect

of State Statute . . . 365
See PILOTS.

FEEBLE-MINDED, SCHOOLS FOR

— Support of Inmates — In-
 sane Hospitals . . . 586
See INSANE HOSPITALS.

FEES — Minimum Charge for Recording

Deeds, Mortgages and Other
 Instruments — Register of Deeds 52

The provision contained in St. 1912, c. 502, § 25, entitled "An Act to shorten the forms of deeds, mortgages and other instruments relating to real property," that "fees for recording instruments drawn in accordance with the provisions of this act shall be the same as those now required by law, but in no case shall the charge for recording a deed or conveyance be less than sixty-five cents, and in no case shall the charge for recording a mortgage be less than one dollar and twenty-five cents," establishes a minimum fee which is applicable to all deeds and mortgages whether or not they conform to the provisions of St. 1912, c. 502.

— Schools — Attendance — Children

under Sixteen Years of Age —
 Employment Certificate — Tran-
 script of Birth Certificate . . . 102
See SCHOOLS.

— Naturalization . . . 195

See CLERKS OF COURTS.

— Inspectors of Boilers — Collection . 590

See INSPECTORS OF BOILERS.

FINES — Payments to cover Sick Bene-

fits — Vacancies in Wage Boards 494
*See MINIMUM WAGE COM-
 MISSION.* 2.

— Employees — Damage to Employer . 344

See LABOR. 6.

FIRE PREVENTION COMMISSIONER

— Civil Service . . . 329

Under St. 1914, c. 795, the appointees in the department of the Fire Prevention Commissioner are subject to the provisions of the civil service law and rules.

2. — Storage of Petroleum in Building

or Other Structure — Require-
 ment of License . . . 405

R. L., c. 102, § 113, permitting the storage of crude petroleum or any of its products in certain buildings without the requirement of a license, was repealed by St. 1904, c. 370.

FIRE PREVENTION COMMISSIONER

— *Continued.*

3. — Storage of Inflammable Fluids — Structures . . . 426

A can is not a structure within the meaning of St. 1904, c. 370, § 3, as amended by St. 1913, c. 452, providing that "no building or other structure shall be used in any city or town" for the storage of inflammable fluids without a license.

4. — Fixtures — Automatic Sprinkler System . . . 572

Under the facts stated, an automatic sprinkler system upon being installed in a building becomes a part of the real estate, so that an order by the Fire Prevention Commissioner under St. 1914, c. 795, to install such a system in a building would apply under section 22 of this act to the owner of the premises and not to the occupant.

5. — Regulation of Use of Gasoline in Power Boats — Federal Jurisdiction . . . 580

While the Fire Prevention Commissioner is authorized by St. 1914, c. 795, to make regulations relative to the use of gasoline on motor boats, this authority does not extend to boats used exclusively on the navigable waters of the United States, as the regulation of boats on such waters is within the power of Congress, and Congress has made regulations governing this subject.

6. — Automatic Sprinklers — Authority to order Installation . . . 585

Buildings in the metropolitan district used as stores which deal in and sell certain commodities mentioned in St. 1914, c. 795, § 10, are used "for the business of keeping" such commodities, and if four or more persons live above the second story of such buildings the Fire Prevention Commissioner has authority to order automatic sprinklers installed therein.

7. — Automatic Sprinkler — Stables . . . 621

Under Gen. St. 1916, c. 158, § 2, providing that stables equipped with an automatic sprinkler system shall not be subject to certain other requirements, the word "stable" means the entire building, so that where the second floor of a building is used for stabling horses, this condition is not fulfilled by equipping that floor alone with an automatic sprinkler system.

FIREMEN'S RELIEF FUND — Personal

Injuries — Effect of Exposure in Course of Duty . . . 427

A fireman disabled by congestion of the kidneys, which is caused by exposure to cold and stormy weather encountered in the performance of his duties at a fire, is entitled to the benefits of R. L., c. 32, § 73, providing that the firemen's relief fund "shall be used for the relief of firemen . . . who may be injured in the performance of their duty at a fire or in going to or returning from the same."

FIREMEN'S RELIEF FUND — Continued.

2. — Workmen's Compensation Act — "Laborers, Workmen and Mechanics" . . . 544

A regular fireman of the city of Boston who was impressed into service of the Peabody fire department by its chief at a serious fire in that town, and who was injured in performing that duty, is a fireman within the meaning of R. L., c. 32, § 73, as amended by St. 1906, c. 171, and is entitled to share in the benefit of the firemen's relief fund.

A fireman is not a laborer, workman or mechanic within the meaning of St. 1913, c. 807, and one who is injured in the performance of his duty is not debarred by section 5 from sharing in the firemen's relief fund by reason of his having been erroneously paid some compensation on account of the same injury.

FIREWARDS — Towns — Appointment by Selectmen . . . 379

The office of fireward established by the General Court of the Province in 1711 and existing under R. L., c. 32, § 9, was not abolished by St. 1907, c. 475, §§ 5 and 10, creating forest firewards; firewards may still be appointed by selectmen of towns when there is no organized fire department.

FLAG — Misuse of — Pictures of Flag — Use on Covers of Papers and Magazines . . . 470

R. L., c. 206, § 5, as amended by St. 1913, c. 464, and St. 1914, c. 570, forbidding the use or possession of "any article or substance, being an article of merchandise or a receptacle of merchandise or articles upon which shall be attached through wrapping or otherwise engraved or printed in any manner, a representation of the United States flag," merely forbids the engraving or printing of the flag, whether for advertising or decorative purposes, upon wrappers or receptacles, or upon articles which are themselves complete articles of merchandise aside from the presence of the flag upon them; and articles of which the representation of the flag is an inherent part, and to which the representation of the flag is not a mere ornamental and unessential addition, do not come within the prohibition of the statute.

A picture of the flag alone or a picture containing it as a *bona fide* part of the picture is not a violation of this statute when engraved or printed on a card or in or upon a book, paper or magazine, provided it is not used in any manner for advertising purposes.

The use of a picture of the flag or one containing a representation of it upon the cover of a book, paper or magazine for artistic or ornamental purposes is not a violation of the statute, unless some part of the use or purpose of such cover is to attract attention to and advertise the publication or its contents.

Red and white stripes, with no field of blue or stars, do not constitute a representation of the flag when it is not obvious that it was intended to depict thereby a portion of the flag.

- FOOD IN COLD STORAGE** — Limit of Time for holding Articles of — Prospective in Effect — Statute 1
See STATUTES. 1.
- FOREMEN AND INSPECTORS** — Vacancies . . . 322
See CIVIL SERVICE. 8.
- FOREST LAND** — Limit of Price to be paid for Land — Incidental Expenses . . . 636
Whether it would be advisable for the State Forest Commission to take a parcel of land by eminent domain rather than by purchase is not a question of law but one of policy for the commission itself to decide.
The restriction placed by St. 1914, c. 720, § 2, upon the price which may be paid per acre for land acquired under that act, refers only to the purchase price, and does not include incidental expenses such as for surveying and examining the title.
- FRAMINGHAM NORMAL SCHOOL** — Laundry. . . 304
See EDUCATION, STATE BOARD OF. 4.
- FRATERNAL BENEFICIARY INSURANCE** — Societies limiting Membership to Certain Classes — When subject to Insurance Laws . . . 401
See INSURANCE. 6.
- FRUIT, VEGETABLES AND NUTS** — Sale of, at Retail by Dry Measure — Legal Weight . . . 27
See CONSTITUTIONAL LAW. 3.
- GAME** — Open Season — Suspension . . 617
Under St. 1909, c. 422, § 1, the Governor is not authorized to issue a proclamation suspending the open season until such season begins.
- "GAME LAWS"** — Revocation of License for Violation — Sale of Game . . . 518
R. L., c. 92, § 14, is a "game law" within the meaning of St. 1911, c. 614, as amended, providing for the revocation of the hunting license of a person violating its provisions.
Numbered tags furnished by the Commissioners on Fisheries and Game must be placed upon the bodies of Scotch grouse, European black game and European black plover before they can be sold by dealers under the provisions of St. 1912, c. 567.
- GASOLINE IN AUTOMOBILE TANKS** — Fire Protection — Storage of Inflammable Fluids — Storage in Bulk . . . 397
Neither St. 1911, c. 477, nor any other statutes then in force concerning the storage of inflammable fluids were repealed by St. 1914,
- GASOLINE IN AUTOMOBILE TANKS** — *Continued.*
c. 795, entitled "An Act to provide for the better prevention of fires throughout the metropolitan district," and, accordingly, gasoline may still be kept in the tanks of automobiles without license or permit in those buildings in which it could be so kept prior to the passage of the last-mentioned statute, but in no others.
Inflammable fluids kept in unopened original receptacles, other than barrels, no one of which contains more than ten gallons, are not kept in bulk within the meaning of St. 1914, c. 795, § 6.
Varnishes and shellacs which are of substantially the same inflammable character as the least inflammable article enumerated in St. 1914, c. 795, § 6, come within the provisions of that section.
- GASOLINE** — Power Boats — Regulation — Federal Jurisdiction . . . 580
See FIRE PREVENTION COMMISSIONER. 5.
- GOVERNOR** — Power to revoke Executive Warrant . . . 438
See EXTRADITION.
- GRADE CROSSINGS** — Powers of Legislature . . . 199
See CONSTITUTIONAL LAW. 16.
- GRATUITY** — Veterans — Re-enlistment . . . 287
See VETERAN. 2.
- GREAT PONDS** — Right of Access — Liability for Trespass . . . 639
In general, the public has a right to pass and repass, for the purpose of hunting or fishing, and possibly other purposes, over uncultivated and unenclosed land belonging to private proprietors and bordering on a great pond, provided there is no other reasonable means of access thereto, without being liable for trespass. But no right of access exists, for the purpose of fishing, to great ponds of twenty acres or less where such ponds are entirely surrounded by land of private proprietors. There is no right of access, in any event, over cultivated land where access may be obtained over uncultivated and unenclosed land.
- Regulation of the Price of Ice . . . 265
See CONSTITUTIONAL LAW. 22.
- HAMPDEN RAILROAD CORPORATION** — Railroad Corporation — Board of Railroad Commissioners — Certificate that Requirements of Law Preliminary to Incorporation have been complied with — Revision by Court or Other Tribunal — Description of Route in Agreement of Association — Certificates of Agreement as to Route in Cities and Towns . . . 87
See RAILROAD CORPORATION.

HARBOR AND LAND COMMISSIONERS — Jurisdiction over Cutting

of Ice on Great Ponds . . . 169
The Board of Harbor and Land Commissioners has no jurisdiction over the cutting of ice on great ponds but, under R. L., c. 96, §§ 18 and 25, has authority to permit ice-harvesting structures to encroach on such ponds or to abate as nuisances structures erected without a license.

— Licenses to build in Tidewater . . . 525
See TIDEWATERS.

HAWKERS AND PEDLERS — Selling of Tags for Charitable Purposes 515

The raising of money for charitable purposes by "selling" tags is not a sale of goods, wares and merchandise within the meaning of R. L., c. 65, §§ 13-29, relating to hawkers and pedlers.

2. — Right of Minor to be licensed as . . . 567

A boy fifteen years of age may be licensed as a hawker and pedler under the provisions of R. L., c. 65, as amended by Gen. St. 1916, c. 242, at least if an employment certificate has been issued to him by the proper school authorities.

3. — Person licensed as a Junk Collector who collects Junk solely by Barter — "Sale" . . . 633

A barter or exchange of goods, wares or merchandise is not strictly a sale, and consequently a person, licensed as a junk collector under St. 1902, c. 187, who collects junk solely by barter of articles of merchandise not mentioned in R. L., c. 65, § 15, is not required to be licensed under the hawker's and pedler's statute.

HOSPITALS — Board of Registration in Pharmacy — Registered Pharmacists . . . 143
See PHARMACY LAW. 2.

HOURS OF LABOR — Street or Elevated Railway Company — Employee . . . 55

A proposed act providing that "a day's work for all conductors, guards, drivers, motormen, brakemen and gatemen who are employed by or on behalf of a street railway or elevated railway shall not exceed nine hours, and shall be so arranged by the employer that it shall be performed within eleven consecutive hours," and that "on legal holidays and on Sundays and in case of accident or unavoidable delay extra labor may be performed for extra compensation," if enacted, would prohibit the employment by a street railway or elevated railway company of any employee, even if such employee so desired, for more than nine hours in any one day, such employment to be performed in eleven consecutive hours, except on legal holidays and on Sundays or in case of accident or unavoidable delay.

HOURS OF LABOR — *Continued.*

2. — Employees of Street and Elevated Railway Companies — Regulation — Legislature — Constitutional Law — Police Power — Construction of Statute . . . 68

The reasonable regulation of the hours of labor for employees of a street or elevated railway company in such a manner as to conserve the health, safety and welfare of the public constitutes a proper exercise of the police power.

In passing an act to provide that "a day's work for all conductors, guards, drivers, motormen, brakemen and gatemen who are employed by or on behalf of a street railway or elevated railway company shall not exceed nine hours, and shall be so arranged by the employer that it shall be performed within eleven consecutive hours," it must be presumed that the Legislature had in view the protection of the health, safety and welfare of the public, and it cannot be said either that such act has no reasonable relation to the object for which it was enacted or that the Legislature could not have found upon evidence presented to it that a condition of affairs existed which required its action in the premises.

Where the question of the constitutionality of a statute is doubtful, the doubt should be resolved in favor of the statute.

3. — Eight-hour Day — Police Drivers 293
Civilians employed as hostlers or drivers in the Boston police department are within the provisions of St. 1911, c. 494, § 1, restricting employment of certain persons to eight hours in a calendar day, but police officers detailed to perform the work of drivers or hostlers are not so restricted.

4. — Materials and Supplies — Eight-hour Day . . . 303

Wood finish, doors, casings, etc., purchased in the open market under a contract to which the Commonwealth is a party, and which enter into the construction of a building, are materials and supplies, and St. 1911, c. 494, § 2, providing for an eight-hour day for employees on State work, does not apply.

5. — Employees for or upon Public Works — Definition . . . 443

St. 1911, c. 494, § 1, establishing eight hours as a day's work for "all laborers, workmen and mechanics now or hereafter employed . . . by any contractor or subcontractor for or upon any public works" applies to all laborers, workmen and mechanics employed by any person contracting, directly or by subcontract, for the performance of any portion of a public work, whether the work is performed upon the public works or at any other place within the Commonwealth, but it does not apply to employees of persons merely selling materials and supplies to such contractors.

HOURS OF LABOR — *Continued.*

— Fair, Reasonable and Appropriate Exercise of Police Power — Question of Fact 20
See CONSTITUTIONAL LAW. 2.

— Minors — Employment of Women — Stenographers and Clerks 118
See MINORS. 1.

— Twenty-four Hours' Rest in Seven Days 137
See LABOR. 1.

— Eight-hour Day — Contract Work 140
See LABOR. 2.

— Liability of Employers and Parents 257
See MINORS. 2.

HUNTERS' REGISTRATION BOOKS

— Custody — City and Town Clerks 152
See COMMISSIONERS ON FISHERIES AND GAME. 1.

ICE — Cities and Towns 160
See CONSTITUTIONAL LAW. 12.

— Cutting on Great Ponds — Jurisdiction of Harbor and Land Commissioners 169
See HARBOR AND LAND COMMISSIONERS.

— Regulation of Price of — Great Ponds 265
See CONSTITUTIONAL LAW. 22.

ICE CREAM — Boards of Health of Cities and Towns — Power to Regulate Trade 390
See CITIES AND TOWNS. 7.

ILLEGITIMATE CHILDREN — Public Records 126
See PUBLIC RECORDS.

INDUSTRIAL SCHOOL FOR GIRLS

— Revocation of Suspended Sentence — Age of Persons committed — Power of Trustees 628

Where a girl has been sentenced to confinement in the Industrial School for Girls while she was under the age of seventeen years, and the sentence then suspended, the suspension may be revoked and the girl committed to this institution, under St. 1913, c. 471, § 2, even after she has attained that age.

Where the order of commitment to this institution recites the age of the girl committed, the recital amounts to an adjudication by the court upon this question, and it is not the duty of the trustees of the institution to inquire into the correctness of this finding.

INSANE HOSPITALS — Power to discharge from — Support of Inmates of Feeble-minded Schools 586

Under St. 1909, c. 504, § 76, the superintendent of a State hospital for the insane, when authorized by the trustees of such hospital or of the State Board of Insanity, may discharge any person committed to such hospital for observation under section 43 unless some limitation to the contrary has been placed on the commitment by the judge.

The trustees of such an institution may receive into its schools feeble-minded persons without certification, as provided by St. 1909, c. 504, § 64, as amended by Gen. St. 1916, c. 22, § 2, and without liability for their support, as provided by St. 1909, c. 504, § 82.

INSANE PERSON — Hospital — Trustees — Authority of Trustees to Limit Number of Patients — State Board of Insanity 79

The trustees of a State hospital for the insane have no authority by vote or resolution to limit the number of patients to be treated at such hospital, and if the State Board of Insanity, in the exercise of the power vested in it by St. 1909, c. 504, § 10, to make such recommendations to the trustees of an institution for the insane as it may deem expedient, should recommend that accommodations be provided for additional patients, it would be the duty of such trustees to provide them.

2. — Temporary Treatment — Request by Police Officer — Probation Officer 467

A probation officer is not a police officer within the meaning of St. 1911, c. 395, as amended by Gen. St. 1915, c. 174, providing for the receiving of persons for temporary care and treatment in hospitals for the insane upon the request of certain officers or individuals.

— Right to operate on Patient without Consent 531
See SURGERY. 2.

INSANITY, STATE BOARD OF — Appointment of Agent to fill New Position — Appropriation 74

Under the provision of St. 1909, c. 504, § 4, that the State Board of Health "may appoint agents and subordinate officers and fix their compensation, but the amount paid for their salaries shall not exceed the appropriation of the general court for that purpose," a position may be created by such Board and an agent appointed to fill it at any time if the salary for such agent as fixed by such Board may be paid from the existing appropriation.

— Insane Person — Hospital — Trustees — Authority of Trustees to Limit Number of Patients 79
See INSANE PERSONS. 1.

INSPECTORS OF BOILERS — Col-
lection of Fee . . . 590

The fee imposed by St. 1907, c. 465, § 14, as amended by St. 1912, c. 531, § 5, for the inspection of boilers, may be recovered in an action of contract brought by the inspector against the owner or user of such boiler.

**INSPECTORS OF MASONRY CON-
STRUCTION** — Building In-
spectors . . . 320
See CIVIL SERVICE. 7.

INSPECTORS OF SLAUGHTERING
— State Board of Health — Local
Boards of Health . . . 146
See STATE BOARD OF HEALTH.
3.

INSURANCE — Massachusetts Employ-
ees Insurance Association — In-
debtedness for Outstanding
Losses — Determination . . . 29

The Massachusetts Employees Insurance Association, incorporated under the provisions of St. 1911, c. 751, Part IV., is not subject to St. 1907, c. 576, § 11, as amended by St. 1911, cc. 54, 315, which, in providing for the determination of indebtedness for outstanding losses, requires an arbitrary charge to be made against any corporation writing policies covering insurance against loss or damage resulting from accident to or injury suffered by an employee or other person for which the insured is liable, and against loss from liability on account of the death of or injury to an employee not caused by the negligence of the employer, to be computed as therein provided.

2. — Life and Disability Insurance —
Separate and Distinct Policies —
Benefits conditioned upon Dis-
ability — Waiver of Premiums —
Special Surrender Values . . . 38

Under the provisions of St. 1907, c. 576, § 34, as amended by St. 1912, c. 524, § 1, that "contracts of insurance for each of the classes specified in section thirty-two shall be in separate and distinct policies . . . except that . . . any foreign life insurance company authorized to transact business in this commonwealth . . . may incorporate in its policies of insurance provisions for the waiver of premiums or for the granting of special surrender values therefor in the event that the insured thereunder shall from any cause become totally and permanently disabled, . . ." a foreign life insurance company authorized to do business in this Commonwealth may incorporate in its policies a provision that in case the insured becomes wholly disabled by bodily injury or disease so as to be permanently and continuously prevented from engaging in any occupation for remuneration or profit after he has attained the age of sixty years, the company "shall waive payment of each premium thereafter becoming due during such disability, but the face amount of the policy shall be re-

INSURANCE — *Continued.*

duced by the amount of each such waived premium, . . ." the deduction so made being the amount of the premium on insurance not presently payable of which the value is at all times less than the amount of the premium in cash, and to the extent of such difference constituting a voluntary relinquishment of premium upon the part of such company.

3. — Title Insurance — Guaranty Fund
— Investment — Mortgages —
Stock in Trade — Trading Cap-
ital . . . 114

A title insurance company organized under the laws of this Commonwealth may not use as ordinary trading capital the guaranty fund which is required to be created and maintained by St. 1907, c. 576, § 64, providing that every such corporation shall set apart and invest as a trust for the benefit of its policyholders not less than two-fifths of its capital to be applied only to the payment of losses and expenses incurred by reason of the guaranty or insurance contracts of the corporation and may not use as stock in trade the mortgages in which such fund is invested.

4. — Insurance Companies — Invest-
ments . . . 144

The words "funded indebtedness," as used in St. 1907, c. 576, § 37, cl. 3, are not synonymous with "contingent liability," and investments by insurance companies in railroad mortgage bonds are lawful where the capital stock of the railroad corporation equals at least one-third of its funded indebtedness.

5. — Investments — Pecuniary Interest
of Officers . . . 208

A person who has an interest in real estate, but solely as trustee for another, may lawfully serve on the investment committee of an insurance company which places a loan on said real estate.

6. — Fraternal Beneficiary Insurance —
Societies limiting Membership to
Certain Classes — When subject
to Insurance Laws . . . 401

A domestic fraternal beneficiary corporation which limits its membership to certain classes of persons, as provided in St. 1911, c. 628, § 12 b, and pays a death benefit in excess of \$200, does not come within the exemption provided for by section 29 b, and must conform to the insurance laws of the Commonwealth.

7. — Stock Insurance Companies —
Participating Policies — Restriction to One Class of Insurance . . . 503

A stock insurance company, other than a life insurance company, which is transacting, as permitted by law, several classes of insurance, may issue policies in one class which provide for a participation in the profits in that class by the holders of such policies, although at the same time it is issuing nonparticipating policies in other classes of insurance.

INSURANCE — Continued.**8. — Life Insurance — Accident Insurance — Two Classes in One Policy 505**

A life insurance policy containing all the standard provisions required for such insurance, and also containing a provision for the payment of double the regular amount of the policy if death results from accident while the insured is traveling as a passenger on a public conveyance, is contrary to the provisions of St. 1907, c. 576, § 34, that contracts for different classes of insurance shall be in separate and distinct policies, and also is in violation of St. 1910, c. 493, requiring certain standard provisions in accident policies.

The provision in such a policy for the payment of an additional amount in case of death by accident constitutes accident insurance.

9. — Purposes of Insurance Company 535

An insurance company may not be incorporated under the laws of this Commonwealth for the three following purposes: (1) To examine, pass upon and guarantee titles to real estate; (2) to guarantee principal and interest of notes secured by first mortgages on real estate; (3) to act as agent in the collection of principal and interest of mortgage notes.

10. — Cash Assets in Excess of Liabilities 552

Where a mutual fire insurance company has cash assets in excess of its liabilities to an amount greater than is permitted by St. 1907, c. 576, § 47, this excess is not reduced by the establishment of a guaranty capital and the issuance to trustees of certificates of stock to the amount of such guaranty capital, which are not sold.

INSURANCE COMPANY — Purposes of Incorporation 535
*See INSURANCE. 9.***— Cash Assets in Excess of Liabilities 552**
*See INSURANCE. 10.***INTEREST — Taxes 509**

Under Gen. St. 1915, c. 237, § 21, interest may be collected at the rate of 6 per cent. on all taxes unpaid after November 1, where no action has been taken upon the subject by the town.

— Expenses of Loans 348
*See LOAN AGENCIES.***— Small Loans 562**
*See PAWNBROKERS.***INTERNAL REVENUE — Tax on Insurance Policies — Rebates 327**

Under the Federal internal revenue law insurance companies are required to pay the tax on policies.

If the tax on insurance policies is added by insurance companies to the premiums it would be a violation of the anti-rebate law for agents to pay the amount of the tax.

INTOXICATING LIQUORS — Sixth

Class License — Breach of Condition — Termination — Forfeiture — Unlawful Sale — Conviction of Clerk of Licensee 60

Under the provisions of R. L., c. 100, § 17, that each license to sell intoxicating liquors issued under the provisions of said section shall be subject, among others, to the condition "that the license shall be subject to forfeiture, as herein provided, for breach of any of its conditions; and that, if the licensee is convicted of a violation of any of such conditions, his license shall thereupon become void," the conviction of the clerk of a licensee holding a sixth class license of an unlawful sale of intoxicating liquor does not in and of itself render such license void, although such conviction constitutes a breach of the conditions of such license which renders it liable to forfeiture.

2. — Licenses rendered void — Conviction — Appeal 157

The provisions of R. L., c. 75, § 107, rendering a liquor license void upon conviction of the licensee, do not apply while an appeal on conviction in a lower court is pending.

3. — Common-law Right to enter a *Nolle Prosequi* 309

The common-law authority of district attorneys to enter a *nolle prosequi* in prosecutions for violation of liquor laws is prohibited by R. L., c. 100, § 55.

4. — Transportation into No-license Municipalities — Time for granting Permits 430

St. 1906, c. 421, § 2, as amended by St. 1911, c. 423, does not limit to the month of April the time in which municipal authorities may grant permits for the transportation of intoxicating liquors into no-license cities and towns, and such authorities have the power in their discretion to grant such permits throughout the year.

INVESTMENTS — Insurance Commissioner — Insurance Companies 144
*See INSURANCE. 4.***— Insurance Companies — Pecuniary Interest of Officers 208**
*See INSURANCE. 5.***— Municipal Bonds 225**
*See SAVINGS BANKS.***JUNK COLLECTOR 633**
*See HAWKERS AND PEDLERS. 3.***JUSTICE OF THE PEACE — Notary Public 124**
*See CONSTITUTIONAL LAW. 9.***JUVENILE REFORMATORY SCHOOL — Inmate — Officer — "Constant Supervision" — Solitary Confinement 2**
See SOLITARY CONFINEMENT.

LABOR — Twenty-four Hours' Rest in Seven Days . . . 137

It is unlawful to permit the taking of inventories by employees during the twenty-four hour rest period in seven consecutive days, required to be given to them under the provisions of St. 1913, c. 619.

2. — Eight-hour Day — Contract Work 140

On public work for the State, performed outside the Commonwealth, citizens of this State must be given the preference.

The eight-hour law has no extra-territorial effect.

3. — Police Officers — Chauffeurs . . . 158

Chauffeurs employed as drivers of a police patrol, and receiving pay as such, are subject to the laws regulating the hours of labor of chauffeurs and not of police officers, even though they are special police officers by appointment and serve as such without pay.

4. — Construction of Public Works . . . 203

Under St. 1909, c. 514, § 21, the phrase "construction of public works" refers to actual building operations and not to the work of preparing material.

5. — Public Works — Citizens . . . 300

Under St. 1914, c. 600, where a city has a list of United States citizens eligible for employment in the street department, it is the duty of the city to discharge noncitizen employees, although their employment commenced prior to the enactment of the statute.

6. — Right to fine Employees for Damages . . . 344

Except in certain cases prohibited by statute, employers of labor may, where provision is made in the contract of employment, lawfully withhold money, due employees as wages, to cover damage to the employer caused by the negligent or wrongful act of the employee.

— Materials and Supplies — Eight-hour Day . . . 303
See HOURS OF LABOR. 4.

LABOR AND INDUSTRIES, STATE BOARD OF — Suction Shuttle 174

The use of the suction shuttle in factories, by whatever device it is operated, is forbidden under St. 1911, c. 281, § 1.

— Board of — Power to Summon Witnesses . . . 565
See WITNESSES.

LABORERS, WORKMEN AND MECHANICS — Firemen's Relief Fund — Workmen's Compensation Act . . . 544
See FIREMEN'S RELIEF FUND. 2.

LAND — Registration — Assurance Fund — Income . . . 18

In R. L., c. 128, relating to the registration and confirmation of titles to land, the provision of § 100, that the income of the assurance fund established by § 93 shall be added to the principal and invested until it amounts to \$200,000, and thereafter shall be used as far as may be to defray the expenses of the administration of the provisions of this chapter, permits the sum accruing from such fund to be used in addition to the annual appropriation made by the Legislature unless it is provided that such appropriation shall include all other sums previously appropriated for such purpose.

LEGISLATURE — Eligibility of Members to Office . . . 238

Members of the Legislature may be appointed, during their term of office, to an office not created by them during said term.

2. — Authority to grant Relief — Salem Fire . . . 289

It is within the constitutional authority of the Legislature to grant such relief to sufferers from a public disaster as may be deemed necessary for the protection of the health and safety of the people.

— Delegation of Legislative Power — Act creating Judicial District — Submission to Voters of District — Right to require Opinion of Justices of Supreme Judicial Court — Important Question of Law . . . 41
See CONSTITUTIONAL LAW. 5.

LIABILITY — Manual Training Schools 343
See CITIES AND TOWNS. 5.

LIABILITY OF EMPLOYERS AND PARENTS — Minors — Hours of Labor . . . 257
See MINORS. 2.

LIBERTY OF THE PRESS — Publication of Names of Persons arrested for Drunkenness . . . 135, 178
See CONSTITUTIONAL LAW. 10, 13.

LICENSE — Steam Boiler or Engine — Locomotive . . . 19

A locomotive used by a railroad company for the purpose of making steam to heat its passenger cars, or for operating steam drills, or for any work necessitating the use of steam power other than the actual work of hauling cars, is within the exemption contained in R. L., c. 102, § 78, as amended by St. 1911, c. 562, § 1, that "no person shall have charge of or operate a steam boiler or engine in this commonwealth, except boilers and engines upon locomotives . . . unless he holds a license as hereinafter provided . . ." and a person in charge of or operating a steam boiler or

LICENSE — *Continued.*

engine thereon is not required to hold a license therefor.

— Sixth Class — Intoxicating Liquor — Breach of Condition — Termination — Forfeiture — Unlawful Sale — Conviction of Clerk of Licensee . . . 60
See INTOXICATING LIQUOR.

— Special — Engineers — Firemen — Employment — Vacations . . . 121
See ENGINEERS.

LICENSE TO BUILD STRUCTURE IN TIDE-WATERS — City of Boston . . . 486
See DIRECTORS OF THE PORT OF BOSTON. 4.

LIFE AND DISABILITY INSURANCE — Separate and Distinct Policies — Benefits conditioned upon Disability — Waiver of Premiums — Special Surrender Value . . . 38
See INSURANCE. 2.

LIFE INSURANCE — Accident Insurance — Two Classes in One Policy . . . 505
See INSURANCE. 8.

LOAN AGENCIES — Expenses of Loans — Interest . . . 348
Under St. 1911, c. 727, expenses actually incurred by the lender may be collected of a debtor.

Although the addition of actual expenses to the interest collected by a loan agency from a debtor would make the cost to the borrower more than 3 per cent. per month, the transaction is lawful under St. 1911, c. 727.

LOANS — Reduction of Rate . . . 335
See CO-OPERATIVE BANKS.

— Shareholders of Co-operative Banks — Matured Shares . . . 388
See CO-OPERATIVE BANKS. 2.

LOCATION, for Trackless Trolleys, Power to Grant . . . 465
See BUSINESS CORPORATIONS.

LOCOMOTIVE — Steam Boiler or Engine — License . . . 19
See LICENSE.

MAIL — Inmates of Wrentham State School — Rights of Trustees . . . 219
See WRENTHAM STATE SCHOOL.

MANUAL TRAINING SCHOOLS — Liability for accidents . . . 343
See CITIES AND TOWNS. 5.

MARRIAGE — Annulment of — Alimony 176

MASSACHUSETTS EMPLOYEES INSURANCE ASSOCIATION — Indebtedness for Outstanding Losses . . . 29
See INSURANCE. 1.

MASSACHUSETTS HIGHWAY COMMISSION — Contract . . . 311
Under a statute authorizing the construction of a street, and providing for a "roadway above the finished subgrade of wood block pavement upon a cement base, or some other suitable material," the last clause refers to the base, and does not warrant the use of pavement other than wood block.

The Massachusetts Highway Commission, in the absence of statutory direction, has authority to exercise its discretion as to the materials to be used in any work.

— Cities and Towns — Regulation of Traffic — Vehicles — Approval . . . 7
See CITIES AND TOWNS. 1.

MASTERS IN CHANCERY — Members of the General Court . . . 457
See CONSTITUTIONAL LAW. 30.

MATERIALS AND SUPPLIES — Labor — Eight-hour Day . . . 303
See HOURS OF LABOR. 4.

METERS, Gas and Electric Light, Testing and Sealing — Weights and Measures — Weighing and measuring Devices for Hire or Reward . . . 86
See WEIGHTS AND MEASURES.

METROPOLITAN PARK COMMISSION — Deeds — Mercantile Purposes . . . 323
A waiting room used for the sale of ice cream, soda, etc., comes within the restriction in a deed of land prohibiting the use of a building for mercantile purposes.

Where similar building restrictions are attached to different portions of a tract of land, each grantee has a right in the nature of an easement, which may be enforced against the grantee of another lot.

METROPOLITAN WATER AND SEWERAGE BOARD — Reservoirs — Right to take Water . . . 510
See RESERVOIRS.

MILITIA — Appointment of Adjutants . . . 536
An adjutant of the commanding officer of a battalion in a regiment of field artillery is not an adjutant of the commanding officer of a regiment within the meaning of article X. of section I. of chapter II. of the Constitution of Massachusetts, providing for the appointment of adjutants by commanding officers of the regiment.

MILITIA — *Continued.*

2. — Salaries of Employees of Commonwealth mustered into Federal Service . . . 583

Under Gen. St. 1916, c. 126, State employees serving in the militia may be paid their ordinary salaries only while performing duty under St. 1908, c. 604, and when mustered into the service of the United States and sent out of the Commonwealth the payment of salaries to them as employees of the Commonwealth must cease by virtue of R. L., c. 6, § 58.

3. — National Guard — United States Service — Ability of Officers to act in Dual Capacity . . . 611

The militia of the Commonwealth having complied with the provisions of the act of Congress of June 3, 1916, its officers, upon being called into the service of the United States, are subject to the orders and control of the President of the United States while in such service, and in so far as their duties in such service are inconsistent with their duties as officers of that part of the National Guard not called into the service of the United States, the Governor, as Commander-in-Chief of the militia, may appoint others to serve temporarily in their places. Until this is done, however, the acts of such officers are valid when acting in the capacity of State officers.

4. — Compensation — Termination of Service . . . 615

A furlough temporary in character or for a short period of time granted to one who has been mustered into the military service of the United States is not a termination of such service within the meaning of Gen. St. 1916, c. 310, § 1, but a furlough for an indefinite period would be.

Non-commissioned officers and men who were mustered into the military service of the United States, as described in the act above-mentioned, who are ordered to remain in Massachusetts to instruct recruits for service on the Mexican border, or other work incidental to such instruction, are entitled to the benefits of this act.

- MILK** — Sealed Bottles — Use for Other Purposes . . . 182

Under R. L., c. 62, § 43, as amended by St. 1909, c. 531, it is not unlawful to make use of glass bottles and jars which have been sealed as measures of milk and cream for other purposes, but they may not be used again as such measures without being resealed.

- Regulation of Sale of — Boards of Health — Articles of Food — Sale — Rules and Regulations — State Board of Health — Approval . . . 100
See STATE BOARD OF HEALTH.
2.

MINIMUM WAGE COMMISSION —

- Authority to establish a Wage Board — Effect of Change in Statutory Method of Selection . . . 447

A wage board not completely established by the Minimum Wage Commission until after the enactment of St. 1914, c. 368, providing a new method for the selection of representatives on such board, can be legally established only by the selection of all its representatives as provided in that statute.

2. — Minimum Wage — Fines — Payments to cover Sick Benefits — Vacancies in Wage Boards . . . 494

The payment by an employer of an amount less than the minimum wage prescribed by a decree of the Minimum Wage Commission constitutes a violation of that decree, and it may not be excused by showing that the prescribed sum has been reduced because of fines for misconduct or tardiness, or because of deductions on account of benefits to accrue to the employee in case of sickness.

It is doubtful if the Minimum Wage Commission has the power to fill a vacancy in a wage board arising after that board has been fully established and organized.

MINORS — Employment of Women —

- Stenographers and Bookkeepers 118

Minors who are employed as bookkeepers, stenographers, clerks or clerical assistants are within the provisions of St. 1913, c. 831, an act regulating the labor of minors.

The law relative to the employment of women as stenographers, bookkeepers and in similar clerical positions was not changed by St. 1913, c. 758.

2. — Hours of Labor — Liability of Employers and Parents . . . 257

Under St. 1913, c. 831, an employer of a minor, who has been duly notified that such employee is being employed for a greater number of hours per week than is authorized by statute, is criminally liable.

Under said chapter, a parent, guardian or custodian of a minor employed for a greater number of hours per week than is authorized by statute is criminally liable without notice.

- Residence of — Schools . . . 166
See EDUCATION, STATE BOARD OF. 2.

- Right to be licensed as Hawker and Pedler . . . 567
See HAWKERS AND PEDLERS. 2.

- MORTGAGES** — Savings Banks — Board of Investment . . . 297
See SAVINGS BANKS. 2.

MOTHERS, with Dependent Children

- Aid — Power of Overseers of the Poor to remove . . . 568
See CHILDREN, DEPENDENT.

MOTOR VEHICLES, Licensing of, by
Selectmen . . . 183
See CONSTITUTIONAL LAW. 14.

— Regulation of Classification — Bond 422
See CONSTITUTIONAL LAW. 29.

MUNICIPAL DEBTS — Bonds and
Notes . . . 261
See CITIES AND TOWNS. 4.

MUNICIPAL LIENS — Repeal of Laws
relating to . . . 547

If House Bill No. 1943, providing for the repeal of Gen. St. 1915, c. 227, were allowed to become a law there would be no legislation in force, except as to the city of Boston, under which a municipality could establish a lien for the construction of streets, sewers and sidewalks.

NATIONAL GUARD — United States
Service — Ability of Officers to
act in Dual Capacity . . . 611
See MILITIA. 3.

NEW YORK, NEW HAVEN & HARTFORD RAILROAD COMPANY — Control of Boston & Maine Railroad through Boston Railroad Holding Company — Effect of Compliance with Decree of United States District Court — St. 1914, c. 766, not accepted . . . 368

History of acquisition of control of the Boston & Maine Railroad by the New York, New Haven & Hartford Railroad Company through the formation of the Boston Railroad Holding Company, with a statement of charter powers of the latter corporation.

St. 1914, c. 766, has not been complied with by the New York, New Haven & Hartford Railroad Company or by the persons named as liquidators in Appendix A annexed to that statute.

The terms of Appendix A to St. 1914, c. 766, have not been substantially incorporated in the decree entered in the United States District Court for the Southern District of New York on Oct. 17, 1914, by consent of the parties, in the suit brought by the United States against the New York, New Haven & Hartford Railroad Company, the Boston Railroad Holding Company and others, alleging an illegal combination in violation of the Sherman act.

St. 1914, c. 766, § 1, did not authorize the Governor to modify the provisions of sections 3, 4 and 5 of that statute creating an option in the Commonwealth to take or purchase shares of stock in the Boston & Maine Railroad owned by the Boston Railroad Holding Company. Appendix A to that statute could not, therefore, be modified to conform to this decree.

Unless the trustees appointed by the decree referred to are hereafter directed by the United States District Court to sell the shares of the Boston & Maine Railroad owned by the

NEW YORK, NEW HAVEN & HARTFORD RAILROAD COMPANY — *Continued.*

Boston Railroad Holding Company, subject to the condition stated in St. 1914, c. 766, a compliance with that act is inconsistent with a compliance with the decree.

The mere transfer by the New York, New Haven & Hartford Railroad Company of the shares of the Boston Railroad Holding Company owned by it to the trustees named in the decree referred to in accordance with the order of the court was not a violation of the laws of this Commonwealth. If hereafter this stock is sold by these trustees by order of the United States District Court without the consent of the General Court, and the purchaser acquires a good title, the terms of the act creating the Boston Railroad Holding Company will then be violated.

The transfer by the New York, New Haven & Hartford Railroad Company of the shares of the Boston Railroad Holding Company to the trustees named in the decree referred to in accordance with the order of the United States District Court was not an acceptance by it of the provisions of St. 1914, c. 766.

NEWSPAPERS — Contracts . . . 138
See CONSTITUTIONAL LAW. 11.

— Regulation of Sale of — Freedom of
Contract — Police Power . . . 386
See CONSTITUTIONAL LAW. 26.

NOLLE PROSEQUI, Common-Law
Right to enter . . . 309
See INTOXICATING LIQUOR. 3.

NOTARY PUBLIC — Justice of the
Peace . . . 124
See CONSTITUTIONAL LAW. 9.

NOTICE TO COMMONWEALTH —
In Cases of Persons without
Settlements — Persons suffering
with Dangerous Diseases . . . 474
See STATE BOARD OF HEALTH.
6.

OFFICE — Eligibility of Members of
Legislature to . . . 238
See LEGISLATURE.

OFFICE, TENURE OF — When ended
by Abolition — Commission on
Mental Diseases — Commission
on Waterways and Public Lands
— Bureau of Prisons — Super-
visor of Administration . . . 573

Under Gen. St. 1916, cc. 285, 288 and 296, providing for the creation of the Massachusetts Commission on Mental Diseases, the Commission on Waterways and Public Lands and the Bureau of Prisons, respectively, and the abolition of the boards by which the powers conferred on the new commissioners were formerly exercised, the members of the old

OFFICE, TENURE OF — *Continued.*

boards continued in office until the appointment and qualification of their successors.

Under Gen. St. 1916, c. 241, providing for the abolition of the Board of Prison Commissioners, the offices of chairman and secretary thereof, the office of deputy commissioner, the Board of Parole for the State Prison and the Massachusetts Reformatory, and the Board of Parole for the Reformatory for Women, and for the transfer of the duties formerly exercised by them to a new commission, the tenure of office of the members of the boards so abolished, by the terms of the act, was terminated on July 1, 1916.

2. — Whether Appointment to fill Vacancy is for Unexpired Portion of Term of Predecessor or for a Full New Term . . . 638

Where a clerk of a district court resigned before the expiration of his term of office, and an appointment was made thereto by the Governor under R. L., c. 160, § 9, the appointee holds for a term of five years from the date of his appointment.

OLEOMARGARINE — Authority of Boards of Health to limit Number of Licenses for Sale of . . . 637

Under R. L., c. 56, § 70, authorizing boards of health of cities and towns to make reasonable rules and regulations as to the conditions under which all articles of food may be kept for sale, they may not limit the number of places where oleomargarine may be sold.

OPEN SEASON — Suspension of . . . 617
See GAME.

OPINION OF JUSTICES OF SUPREME JUDICIAL COURT — Right to require — Legislature — Delegation of Legislative Power — Act creating Judicial District — Submission to Voters of District — Important Question of Law . . . 41
See CONSTITUTIONAL LAW. 5.

OSTEOPATH — Registered — Death Certificate . . . 406
An osteopath registered under St. 1909, c. 526, may not legally furnish the death certificate required to be furnished by physicians under R. L., c. 29, §§ 10 and 12.

PARDONS — Expiration of Prison Term 224
Where the term of a prisoner expires on Sunday by reason of a pardon issued by the Governor and Council, the prisoner should be discharged on the preceding Saturday.

PAROLE — Violation of terms of — Duration of Sentence . . . 228
See PRISONERS.

PARTICIPATING POLICIES — Restriction to One Class of Insurance — Stock Insurance Companies . . . 503
See INSURANCE. 7.

PAUPER LAW — Dependent Children — Aid to Mothers — Power of Overseers of Poor to remove to Place of Settlement . . . 568

Neither the overseers of the poor of a city or town which renders aid under St. 1913, c. 763, to a mother with dependent children under the age of fourteen years who has no settlement in such city or town, nor the overseers of the poor of the city or town in which she may have a settlement, can cause the removal of such family to the city or town of settlement.

PAWNBROKERS — Interest on Small Loans . . . 562

The rate of interest which may be charged by pawnbrokers for small loans is not affected by St. 1911, c. 727, § 7, as amended by Gen. St. 1916, c. 224.

PERSONAL LIABILITY — Automobiles owned by the Commonwealth — Negligence of Chauffeur in the Employment of the Commonwealth — Members of Boards or Commissions . . . 107
See COMMONWEALTH. 2.

PETROLEUM — Storage of, in Building or Other Structure — Requirement of License . . . 405
See FIRE PREVENTION COMMISSIONER. 2.

PHARMACY LAW — Business of Pharmacy — Dry Goods and Mercantile Corporation — Lease of Floor Space to Registered Pharmacist — Ownership of Stock in Trade . . . 109

Where a corporation organized to carry on a dry goods and mercantile business, leases floor space to a registered pharmacist to conduct the business of pharmacy upon the condition that the leased premises shall be held by the lessee "for and during such time as he shall continue to run the drug store therein, yielding and paying therefor as rent such proportion of the gross profits arising from the operation, conduct and maintenance of said store as shall be agreed to between said lessor and said lessee," the lessor retaining the ownership of all stock in trade, and the only interest of the registered pharmacist being that of lessee, such corporation is engaged in retailing, compounding for sale or dispensing for medicinal purposes drugs and medicines, within the provisions of R. L., c. 76, § 18, as amended by St. 1913, c. 720, § 1, that "whoever, not being registered as aforesaid, retails, compounds for sale or dispenses for medicinal purposes drugs, medicines, chemicals or poisons, . . . shall be punished

PHARMACY LAW — *Continued.*

by a fine of not more than fifty dollars, . . .” and that “no unregistered co-partner or unregistered stockholder in a corporation doing a retail drug business shall hereafter be actively engaged in the drug business,” and, not being registered, is unlawfully engaged therein.

2. — Registered Pharmacists — Hospitals . . . 143

Under St. 1913, c. 705, the Board of Registration in Pharmacy should pass on each application for a permit to do a drug business, and may not adopt a set of rules to govern generally.

Hospitals and dispensaries need not have registered pharmacists when in charge of competent physicians.

3. — Corporations — Drug Stores . . . 170

Under St. 1913, c. 705, § 4, a drug store, if managed by a registered pharmacist, may be owned by a corporation some of whose stockholders are not registered pharmacists.

4. — Ownership of Stock in Corporation — Payment by Promissory Note . . . 492

The fact that a registered pharmacist holds a certificate of stock in a corporation formed to carry on a drug business, for which he has paid by giving to the corporation his personal note, does not necessarily make him an owner of such stock within the meaning of R. L., c. 100, § 22, as amended by St. 1913, c. 410. The question of *bona fide* ownership must be determined on the facts of each case.

If stock held by a registered pharmacist in such a corporation is mortgaged or pledged he is not an owner of it within the meaning of this statute.

PILOTS — Coastwise Steam Vessels — Requirement of Federal License — Effect on State Statute . . . 365

R. L., c. 67, §§ 25 and 28, so far as they relate to coastwise steam vessels, are inconsistent with and annulled by U. S. Rev. Stats., §§ 8153 and 8206, and, therefore, a Boston pilot must in addition to his State commission carry a Federal license in order legally to pilot coastwise steam vessels not sailing under register.

PLANNING BOARD — Of the City of Boston . . . 153
See CIVIL SERVICE. 4.**PLUMBERS** — Requirement that Work shall be done by Master Plumbers . . . 252
See CONSTITUTIONAL LAW. 21.**POLICE DRIVERS** — Eight-hour Day . . . 293
See HOURS OF LABOR. 3.**POLICE POWER** — Constitutional Law — Deductions from Employee's Pay . . . 521

House Bill No. 1713, providing that no employer shall deduct from an employee's pay

POLICE POWER — *Continued.*

more than the amount of wages in actual time lost on account of the employee's coming late to work, is a valid exercise of the police power and would be constitutional if enacted.

— Exercise of — Hours of Labor — Questions of Fact . . . 20
See CONSTITUTIONAL LAW. 2.— Construction of Statute — Hours of Labor — Employees of Street and Elevated Railway Companies — Regulation — Legislature — Constitutional Law . . . 68
See HOURS OF LABOR. 2.— Constitutional Law — Regulation of Sale of Theatre Tickets . . . 519
See THEATRE TICKETS.**POULTRY PREMIUM BOUNTY** . . . 222
See AGRICULTURE, STATE BOARD OF. 2.**PRISON COMMISSIONERS, BOARD OF** — Prison Camp — Labor . . . 332

Under R. L., c. 225, §§ 63 and 65, the employment of prisoners at the Prison Camp is limited to the reclamation and improvement of waste places, the cultivation of lands and the preparing of material for road building.

2. — Male Laborers — Wages . . . 489

St. 1914, c. 458, providing that “the wages paid by the board of prison commissioners to male laborers directly employed by it shall not be less than two dollars and a half a day,” applies to all male laborers employed at the Reformatory for Women.

PRISONERS — Violation of Parole — Determination of Duration of Sentence . . . 228

Although a prisoner released on parole has been returned for breach of same, if his conduct while in prison has been perfect, he is entitled to the usual deduction of six days for every month of imprisonment.

2. — Sentence — Permit to be at Liberty — Effect . . . 623

Where a permit to be at liberty has been issued to a prisoner under R. L., c. 225, § 117, as amended by St. 1906, c. 244, if it is subsequently revoked, the prisoner is treated as not having served any portion of his sentence beyond the time he was held in prison, and therefore, if the revocation was made before the expiration of his original sentence, it is immaterial that the order of arrest issuing on such revocation is not served until after the expiration of such time.

— Expiration of Term of Sentence . . . 224
See PARDONS.

PRISONERS — *Continued.*

— Employment of — Prison Camp —
Labor 332
See PRISON COMMISSIONERS,
BOARD OF.

PRIVATE WAY — Width and Grade —
Cities and Towns — Regulations 15
See CONSTITUTIONAL LAW. 1.

PRIZES — State Board of Agriculture . 175
See STATE BOARD OF AGRICUL-
TURE.

PROBATION OFFICER — Retirement 576
Gen. St. 1916, c. 225, does not authorize the
retirement of a probation officer who, although
he has been in the service for twenty consecu-
tive years or more, has devoted his entire time
to the duties of his office for only a portion of
the twenty-year period.

— Temporary Treatment — Insane
Person — Request by Police
Officer 467
See INSANE PERSON. 2.

PROMOTION — Fire Department —
Civil Service 151
See CIVIL SERVICE. 3.

PROPERTY — Carcass of Deer . . . 512
See DEER.

PUBLIC DOCUMENTS 212
See CITIES AND TOWNS. 2.

PUBLIC DOMAIN — Cities and Towns
— Sale of Land 346
See CITIES AND TOWNS. 6.

PUBLIC FUNDS — Unearned Salaries . 513
See SALARIES.

PUBLIC INSTITUTIONS — Water
Pipes — Highways — Grant by
Selectmen 342
Selectmen of towns may authorize the lay-
ing of water pipes in streets by trustees of a
public institution.

PUBLIC OFFICER — Removal of —
Executive Council — Powers —
No Right to reconsider Removal
after Appointment and Qualifi-
cation of Successor 381
See EXECUTIVE COUNCIL.

PUBLIC RECORDS — Illegitimate
Children 126
Under R. L., c. 29, § 1, par. 2, it is unlawful
for a city or town clerk to use the term "illegit-
imate" in the record of the birth of a child un-
less the illegitimacy has been legally determined
or admitted by the sworn statement of both the
father and mother of the child.

PUBLIC SERVICE COMMISSION —

Commonwealth Pier — Intra-
state Shipments — Alleged Dis-
crimination in Rates by Railroad 478

The shipment of imported merchandise to
the Commonwealth Pier, consigned by the
carrying steamer to Boston business houses and
shipped by them in whole or in part from the
pier to points within the State, does not con-
stitute an intrastate shipment unless the Com-
monwealth Pier was intended to be the ulti-
mate destination, and a reshipment of the
goods from the pier to an intrastate point was
determined upon only after the arrival of the
goods in port.

The Attorney-General declines to advise the
Public Service Commission upon an assump-
tion inconsistent with the contention being
made by him before the Supreme Judicial
Court and the Interstate Commerce Commis-
sion.

PUBLIC WAREHOUSES — Storage of

Second-hand Goods and Furni-
ture 466
R. L., c. 69, as amended by Gen. St. 1915,
c. 98, applies to buildings or parts of buildings
used for the storage of second-hand goods or
furniture.

PUBLIC WORKS — Construction of . 203
See LABOR. 4.

— Contracts — Labor 278
See CONTRACTS. 1.

— Labor — Citizens 300
See LABOR. 5.

— Employees upon — Hours of Labor
— Definition 443
See HOURS OF LABOR. 5.

RAILROAD CORPORATION — Board

of Railroad Commissioners —
Certificate that Requirements of
Law Preliminary to Incorpora-
tion have been complied with —
Revision by Court or Other Tri-
bunal — Description of Route
in Agreement of Association —
Certificates of Agreement as to
Route in Cities and Towns —
Hampden Railroad Corporation 87

Where the Board of Railroad Commissioners,
under the provisions of St. 1906, c. 463, Part
II., § 24, has duly certified that the require-
ments of such chapter preliminary to the incor-
poration of a railroad corporation under gen-
eral laws have been complied with, the decision
of such Board in the premises should not be
considered as subject to revision by any other
executive or administrative board or commis-
sion.

The powers vested in a railroad corporation
organized under general laws with respect to
fixing the route of its railroad are to be deter-
mined not only from the description of such

RAILROAD CORPORATION — *Continued.*

route contained in its certificate of organization, but also from the certificates fixing the route in the several cities and towns through which such railroad is to pass, as provided for in St. 1906, c. 463, Part II., §§ 20-24, inclusive. The Hampden Railroad Corporation may, therefore, construct its railroad upon the route shown to be fixed by the certificates annexed to the agreement of association on file in the office of the Secretary of the Commonwealth in accordance with the provisions of section 24; and the description of the route contained in such agreement of association, so far as it is not required by law and is inconsistent with the route fixed under authority of sections 20 and 21, may be disregarded.

RAILROADS — Regulation of Compensation of Employees . . . 282
See CONSTITUTIONAL LAW. 24.

REGISTERED PHARMACIST — Ownership of Stock in Corporation — Payment by Promissory Note . . . 492
See PHARMACY LAW. 4.

REGISTERED PHYSICIANS — Application of Statute Requirement to State Institutions — Assistants to Superintendents . . . 432

Assistants to superintendents in State institutions, if practicing or attempting to practice medicine in any of its branches, must be duly registered in accordance with the requirements of R. L., c. 76, § § 1-9.

REGISTERS OF DEEDS — Salaries . . . 296

Salaries of registers of deeds are to be readjusted each year in accordance with the classifications provided for by St. 1904, c. 452.

— Fee — Minimum Charge for Recording Deeds, Mortgages and Other Instruments . . . 52
See FEES.

REGISTRATION — Dentistry — Candidate, Educational Requirements 550
See DENTISTRY.

REGISTRATION OF LAND — Assurance Fund — Income . . . 18
See LAND.

RELIGIOUS BELIEF of Public School Teachers — Bill Forbidding Inquiry by School Officials . . . 418
See CONSTITUTIONAL LAW. 28.

RESERVOIRS — Right to take Water from . . . 510

In the absence of special circumstances no person has a right to take for his own use water from a reservoir under the charge of the Metropolitan Water and Sewerage Board, without its consent.

RETIREMENT — Veteran in the Service of the Commonwealth — Elective Officer . . . 54
See VETERAN.

— Commonwealth — Employees — Head of Department — Chairman of Board or Commission . . . 105
See COMMONWEALTH. 1.

— Probation Officer — Retirement . . . 576
See PROBATION OFFICER.

RETURNS — Educational Institutions — Charitable Corporations . . . 352
See EDUCATIONAL INSTITUTIONS.

SALARIES — Unearned cannot be paid from Public Funds . . . 513
The payment of a salary by the Massachusetts Agricultural College to the estate of a deceased employee for the period after his death would be an unauthorized expenditure of public funds contrary to R. L., c. 6, § 58.

— Increase of — Stenographers and Clerks — Promotions . . . 435
See STENOGRAPHERS AND CLERKS.

— Of Employees of Commonwealth — When mustered into Federal Service . . . 583
See MILITIA. 2.

— Of Officers — State Hospitals — Boards of Trustees — Approval by Governor and Council . . . 164
See STATE HOSPITALS.

SALE — Of Fruit, Vegetables and Nuts at Retail by Dry Measure — Legal Weight . . . 27
See CONSTITUTIONAL LAW. 3.

— Conditional — Automobile Registration, Owner . . . 608
See AUTOMOBILES.

SALEM FIRE — Authority of Legislature to grant relief . . . 289
See LEGISLATURE. 2.

SALISBURY BEACH — Constitutional Law — Eminent Domain . . . 516
See EMINENT DOMAIN.

SAVINGS BANKS — Investments — Municipal Bonds . . . 225
Savings banks may invest in city bonds in certain States where "money and credits" of said city, added to the last assessed valuation, bring the valuation of the taxable property therein within the provisions of St. 1912, c. 580, § 1, f.

SAVINGS BANKS — *Continued.*

2. — Boards of Investment — Mortgages 297

The position held by a member of a board of investment of a savings bank becomes vacant in sixty days after such member holds, either personally or as trustee, property mortgaged to said bank.

3. — Form of Deposits — Accounts Payable only to Persons Other than Depositor 437

A savings bank is not authorized to receive deposits subject to the control and withdrawal only of a person other than the depositor.

- SAVINGS DEPARTMENT** — Trust Company — Loan to single individual 8
See TRUST COMPANY.

- SCHOOLHOUSES** — Use for Municipal and Other Purposes — Liability for Damages 201

No liability attaches to a city or town for damages caused by defects or negligence in or around public school property while said property is used strictly for municipal purposes.

- SCHOOLS** — Attendance — Children under Sixteen Years of Age — Employment Certificate — Transcript of Birth Certificate — Fees 102

The provision of St. 1913, c. 779, § 18, amending St. 1909, c. 514, § 60, as amended by St. 1910, c. 257, § 4, that "no fee shall be exacted for an employment certificate or for any of the papers required by this act," in connection with the employment of children under sixteen years of age, is not applicable to birth certificates or duly attested transcripts thereof made by registrars of vital statistics, city or town clerks, or other officers charged with the duty of recording births.

2. — Tuition of Nonresident Pupils . . . 331
Where pupils are attending school in a town other than that of their residence, the cost of such attendance should be computed on the average expense for each pupil in that school, and not on the average expense for pupils in such town.

3. — Domicil of Parent — Tuition . . . 340
The domicil of the parent of a minor attending school is the domicil of the minor, and such domicil is responsible for the tuition of the child.

- Superintendency Union — Towns . . 323
See EDUCATION, STATE BOARD OF. 5.

- Evening — Teachers' Retirement . . 325
See TEACHERS. 1.

- SCHOOL TEACHERS** — Religious Belief — Bill Forbidding Inquiry by School Officials 418
See CONSTITUTIONAL LAW. 28.

- SENTENCE** — Permit to be at Liberty — Effect 623
See PRISONERS. 2.

- Suspended — Revocation — Age . . 628
See INDUSTRIAL SCHOOL FOR GIRLS.

- SIGNATURES** — Weights and Measures 316
See WEIGHTS AND MEASURES, SEALER OF.

- SOLDIER** — Compensation — Termination of Service 615
See MILITIA. 4.

- SOLITARY CONFINEMENT** — Juvenile Reformatory School — Inmate — Officer — "Constant Supervision" 2

Under the provisions of St. 1911, c. 265, § 1, that "it shall be unlawful for the officers of any juvenile reformatory school to place an inmate in any cell, room or cage in solitary confinement," the term "solitary confinement" imports an involuntary restraint in solitude, as a disciplinary penalty for some offence committed, and if the assignment of an inmate of such a school to a separate room is not made as a punishment for an offence committed while an inmate thereof, but is due merely to the segregation of inmates in the ordinary management and discipline of the school, or is a part of the treatment for the correction of moral delinquencies or physical defects, it does not constitute solitary confinement within the meaning of such provision.

Under the further provision of St. 1911, c. 265, § 1, that, "whenever restraint or separation from the other inmates is necessary, confinement shall be permitted only in a place where the inmate is under the constant supervision of an officer of the school," an inmate of such a school may be confined alone in a cell, room or cage if such confinement is not in the nature of a punishment, or may be confined in a cell, room or cage as a punishment provided such inmate is under the constant supervision of an officer of the school.

The term "constant supervision," as used in St. 1911, c. 265, § 1, does not mean the continuous or uninterrupted presence of an officer in the same cell, room or cage with the inmate, but requires a special supervision or observation sufficiently close to keep such officer constantly informed of the conduct and situation of such inmate.

Under the provisions of St. 1911, c. 265, § 1, inmates of juvenile reformatory schools occupying their own single bedrooms at night, with the doors closed and opening off and upon either side of a long corridor, are not so separated from the other inmates as to require constant supervision by an officer of such school, but if an inmate is, for disobedience, confined alone in such a bedroom either with or without further physical restraint, such confinement would require the constant supervision of such officer.

SPRINKLERS, AUTOMATIC — Fix- tures	572
See FIRE PREVENTION COM- MISSIONER. 4.	
— Installation	585
See FIRE PREVENTION COM- MISSIONER. 6.	
— Stables	621
See FIRE PREVENTION COM- MISSIONER. 7.	

STATE BOARD OF HEALTH — Cities
and Towns — Boards of Health
— Rules and Regulations relat-
ing to the Keeping and Exposure
for Sale of Articles of Food —
Approval — Public Hearing 16

Under the provisions of R. L., c. 56, § 70, as amended by St. 1912, c. 448, that "boards of health of cities and towns may make and enforce reasonable rules and regulations, subject to the approval of the state board of health, as to the conditions under which all articles of food may be kept for sale or exposed for sale" and that "any person affected by such rules and regulations, in the form in which they are presented to the state board of health for approval, may appeal to the said board for a further hearing," the State Board of Health is not required to hold a public hearing before approving rules and regulations submitted to it unless some person affected thereby has applied to such Board for further hearing.

2. — Boards of Health — Articles of
Food — Sale — Rules and Regu-
lations — Approval — Regula-
tion of Sale of Milk 100

The provision of St. 1912, c. 448, amending R. L., c. 56, § 70, that "boards of health . . . may make and enforce reasonable rules and regulations, subject to the approval of the state board of health, as to the conditions under which all articles of food may be kept for sale or exposed for sale, . . ." must be construed in connection with the original provision of section 70, that "boards of health . . . may inspect the carcasses of all slaughtered animals, and all meat, fish, vegetables, produce, fruit or provisions of any kind found in their cities or towns" and "if, on such inspection, it is found that such carcasses or articles are tainted, diseased, corrupted, decayed, unwholesome or, from any cause, unfit for food, the board of health shall seize the same and cause it or them to be destroyed forthwith or disposed of otherwise than for food," and the application of the words "all articles of food" in the amendment must be limited to the articles of food enumerated in the original provision. It follows, therefore, that such provisions do not authorize the regulation of the sale of milk.

3. — Local Boards of Health — Inspec-
tors of Slaughtering 146

A local board of health cannot lawfully nominate one of its own members as inspector

STATE BOARD OF HEALTH — *Con-
tinued.*

of slaughtering, and the State Board of Health is within its rights in refusing to approve a nomination so made.

4. — Civil Service 298
The powers and duties of the State Board of Health are retained until the Department of Health is organized.

The secretary of the State Board of Health ceases to hold office upon the abolition of the Board.

Employees of the State Board of Health holding offices not created by statute hold office until removed or until their successors are appointed.

5. — Creation — Effect on Existing
Health Regulations 403

Rules and regulations established under authority of R. L., c. 75, § 113, and the penalties for the infringement thereof established by R. L., c. 75, § 122, were not repealed or affected by St. 1914, c. 792, entitled "An Act to create a State Department of Health and to amend the public health laws."

6. — Persons suffering with Dangerous
Diseases — Notice to Common-
wealth in Cases of Persons with-
out Settlements 474

Under St. 1902, c. 213, as amended by St. 1909, c. 380, if a person afflicted with tuberculosis goes to a State sanatorium for treatment after the notices required by these statutes have been given to the State Department of Health and the State Board of Charity, and then subsequently is discharged and returns to his place of domicile, the local board of health is not required to give further notice to the State Department of Health, unless the patient has been discharged as cured or in such a condition that at the time of his discharge he is not a source of contagion or infection.

After a physician has once reported a case of tuberculosis to the local board of health, in the event that the patient leaves the city or town temporarily, he is not obliged under the provisions of law, when the patient returns, to report the case again to the local board of health, nor is the latter obliged so to report it to the State Department of Health.

STATE FORESTER — Sales of Wood
and Lumber 277

Under St. 1908, c. 478, moneys received by the State Forester for the Commonwealth, on account of wood and lumber sold by him, must be paid to the State Treasurer, and cannot be credited to the Forester's department.

— Public Domain — Sales 346
See CITIES AND TOWNS. 6.

STATE HOSPITALS — Boards of Trustees — Salaries of Officers — Approval of Governor and Council . 164

Where offices are created in connection with State institutions under St. 1909, c. 504, either directly or by action of the trustees, salaries to be paid persons holding such offices must be approved by the Governor and Council.

STATE INSTITUTIONS — Land and Buildings belonging to State Hospital — Trustees — Exclusion of Public from Use of Land . 112
See COMMONWEALTH. 3.

— Application of Statute Requirement to State Institutions — Assistants to Superintendents . 432
See REGISTERED PHYSICIANS.

STATUTES — Limit of Time for holding Articles of Food in Cold Storage — Prospective in Effect . 1

The provision of St. 1912, c. 652, § 5, that "no article of food shall be held in cold storage within this commonwealth for a longer period than twelve calendar months, except with the consent of the state board of health as herein-after provided," is not retroactive in effect, and is not applicable to goods received into cold storage previous to Sept. 1, 1912, the date upon which such statute took effect.

2. — Construction of Contradictory Provisions — Sale of Eggs which by Reason of Decay or Decomposition are Unfit for Food — Prohibition . 58

The effect of St. 1913, c. 654, § 1, providing that "it shall be unlawful . . . to sell, offer for sale, expose for sale, or have in possession with intent to sell, eggs that are unfit for food within the meaning of this act," is limited to the sale, exposure for sale or intent to sell eggs which by reason of decay or decomposition are unfit for food, notwithstanding that by section 2 such statute is declared to be applicable to "eggs, which, either before or after removal from the shell, are wholly or partly decayed or decomposed," and that from the viewpoint of the chemist the process of decay or decomposition in eggs begins immediately after they have been laid.

3. — General and Special — Codification — Special Statute not repealed by Codification of General Statutes — Boston Consolidated Gas Company . 392

St. 1906, c. 422, entitled "An Act to promote the reduction of the price of gas in the city of Boston and its vicinity," generally known as the "sliding scale act," was not repealed or superseded by St. 1914, c. 742, entitled "An Act to consolidate the laws relative to the manufacture, distribution and sale of gas and electricity."

STENOGRAPHERS AND CLERKS — Civil Service — Grade of Stenographers and Clerks — Promotions — Increase of Salaries . 435

Under St. 1914, c. 605, entitled "An Act to establish grades for the salaries of clerks and stenographers employed in the departments of the Commonwealth," a head of a department may promote a clerk or a stenographer for positive merit from a lower grade to a higher grade without limitation.

When a clerk or a stenographer is assigned to a grade by promotion or original appointment, by section 3 of this statute he or she may be put, by the head of the department, at the second or third years of the grade in exceptional cases; but within the grades established by this statute the salary of a clerk or a stenographer cannot be increased by more than an annual increment of \$50 without the approval of the Governor and Council, as provided in section 5.

STORAGE OF INFLAMMABLE FLUIDS — Gasoline in Automobile Tanks — Storage in Bulk — Fire Protection . 397
See GASOLINE IN AUTOMOBILE TANKS.

— Structures — Fire Prevention . 426
See FIRE PREVENTION COMMISSIONER. 3.

STORAGE OF SECOND-HAND GOODS — Furniture . 466
See PUBLIC WAREHOUSES.

STREET RAILWAYS — Authority to become Common Carriers of Express Matter and Freight — Regulations and Restrictions — Board of Railroad Commissioners — Approval . 45

Where, under the provisions of St. 1907, c. 402, § 1, that a street railway company may become a common carrier of newspapers, baggage, express matter and freight in such cases, upon such parts of its railway, and to such extent, in any city or town, as the board of aldermen or the selectmen in such city or town and the Board of Railroad Commissioners shall by order approve, and that if the board of aldermen or selectmen act adversely upon the petition of the company or fail to act within sixty days from the date of the filing thereof, the petitioner or interested party may present a petition to the Board of Railroad Commissioners, who, if public necessity and convenience require the granting of such petition, shall make an order requiring any street railway company named in such petition to act as such common carrier in such cases, upon such parts of its railway and to such extent and under such regulations and restrictions as in the opinion of said railroad commissioners public necessity and convenience require, the board of selectmen of a town had authorized a street railway

STREET RAILWAYS — *Continued.*

to become a common carrier of newspapers, baggage, express matter and freight, and thereafter, before any action was taken by the street railway company to obtain the approval of the Board of Railroad Commissioners, duly revoked its order, such revocation does not constitute adverse action upon the petition which would authorize the Board of Railroad Commissioners to receive and act upon such petition. If, however, no further action was taken within sixty days of the date of the filing of the petition, the selectmen have failed to act within the meaning of the provision above cited and the Board of Railroad Commissioners would be authorized to entertain a petition by the street railway company or any other interested party, and, after public notice and a hearing, to determine whether or not public necessity and convenience required the granting thereof.

Where a board of selectmen in an order approving of a street railway becoming a common carrier of newspapers, baggage, express matter and freight under the provisions of St. 1907, c. 402, includes therein illegal limitations or conditions, the Board of Railroad Commissioners may disregard such illegal limitations and conditions and may approve such matters contained in the order as the selectmen were authorized to include therein.

STREET OR ELEVATED RAILWAY COMPANY — Employee —

Hours of Labor 55
See HOURS OF LABOR.

— Employees — Hours of Labor —
Regulation — Legislature —
Constitutional Law — Police
Power — Construction of Stat-
ute 68
See HOURS OF LABOR. 2.

STRUCTURE — Storage of Inflammable
Fluids 426
See FIRE PREVENTION COM-
MISSIONER. 3.

SUCTION SHUTTLE 174
See LABOR AND INDUSTRIES,
BOARD OF.

SUPERINTENDENCY UNION 323
See EDUCATION, STATE BOARD
OF. 5.

SURETY COMPANIES — Bonds — Re-
newals 210
A surety company bond may be renewed and
its term extended by a separate instrument
properly executed.

SURGERY — Unauthorized Operations,
when permitted 116
A surgical operation which is immediately
necessary for the preservation of life or health
may be performed without the consent of the

SURGERY — *Continued.*

patient if it is impracticable to secure such con-
sent or the consent of any one authorized to
speak for him.

2. — Insane Asylum — Right to oper-
ate on Patient 531

Before a lumbar puncture can be made on
an insane patient in an insane asylum, the con-
sent of the patient's guardian must be secured,
if the patient is incapable at the time of giving
an intelligent consent; if the patient is capable
of consenting, his own consent is first necessary.

TAGS — Sale of, for Charitable Purposes 515
See HAWKERS AND PEDLERS.

**TANGIBLE PROPERTY HELD IN
PLEDGE** — Corporation Fran-
chise Tax — Merchandise 501
See TAXATION. 3.

TAX COLLECTOR — Bond of — F g h
to discharge and accept New
Bond 445

There is no provision of law authorizing the
surrender and cancellation of a bond given by
a tax collector under the provisions of R. L.,
c. 25, § 77, before its condition is fully per-
formed, and the acceptance of a new bond for
a lesser amount in place thereof.

2. — Taxes — Approval by Tax Com-
missioner — Bond of Collector
for Cities 540

By Gen. St. 1916, c. 131, the duty is imposed
upon the Tax Commissioner to approve the
form of bonds of collectors of taxes for cities
unless inconsistent with some provision in the
city charter.

TAX ON INSURANCE POLICIES —
Rebates 327
See INTERNAL REVENUE.

TAX RETURN — Inspection of 221
See COMMISSIONER OF CORPORA-
TIONS.

TAXATION — Domestic Business Cor-
poration — Distribution of Tax
— Canal Company — Corpora-
tion having the Right to take or
condemn Land — The Essex
Company 82

The words "domestic business corporation,"
as used in St. 1910, c. 456, § 1, providing that
the tax assessed upon domestic business cor-
porations under the provisions of St. 1909, c.
490, Part III., shall be distributed, credited
and paid to cities and towns or shall be retained
by the Commonwealth in the manner therein
provided, are to be construed as having the
meaning of the same words as used in St. 1909,
c. 490, Part III., defined in section 39 to include
"every corporation of the classes enumerated
in section one of chapter four hundred and
thirty-seven of the acts of the year nineteen
hundred and three."

TAXATION — Continued.

By St. 1903, c. 437, § 1, after enumerating the classes of corporations to which such chapter shall apply, it is provided that "it shall not apply to corporations organized under general or special laws of this commonwealth for the purpose of carrying on within the commonwealth the business of a . . . canal, aqueduct or water company . . . or to any other corporations which now have or may hereafter have the right to take or condemn land or to exercise franchises in public ways . . ." It follows that since the Essex Company, which was chartered by special act (St. 1845, c. 163) and owns canals and locks in the city of Lawrence, and is vested with the right to take or condemn lands and to exercise franchises in public ways, is excluded from the provisions of St. 1903, c. 437, the business corporation law, it is, therefore, not a domestic business corporation within the meaning of St. 1910, c. 456, § 1.

2. — Income from Annuity Contract issued by a Savings Bank . . . 499

The income from an annuity contract issued by a savings bank under St. 1907, c. 561, is exempt from local taxation by the provision of § 24 of that statute, that "all insurance policies and annuity contracts issued by such banks shall otherwise be exempt from taxation."

3. — Corporation Franchise Tax — Merchandise — Tangible Property held in Pledge . . . 501

Tangible personal property held by a Massachusetts corporation in pledge as security for money loaned by it is to be treated in determining its franchise tax as merchandise of the corporation, within the meaning of St. 1909, c. 490, Part III., § 43.

4. — Domestic Corporations — Deductions . . . 555

Notes, bills receivable, cash on deposit in banks or trust companies and other intangible property of a like nature belonging to a domestic corporation are not deductible as property situated in another State and subject to taxation therein in the determination of its franchise tax under the provisions of St. 1909, c. 490, Pt. III., § 41.

— Exemptions — Industries . . . 192
See CONSTITUTIONAL LAW. 15.

— Public Purpose — Construction of Dry Dock . . . 483
See CONSTITUTIONAL LAW. 31.

TAXES — Municipal Corporations . . . 534

Under Senate Bill No. 346, providing for the setting off of a part of the town of Blackstone and incorporating it as the town of Millville after the first day of April, taxes for the current year assessed to inhabitants of and upon property located within the area so set off are payable to the town of Blackstone.

TEACHERS — Evening Schools . . . 325

A teacher who resigned in 1911 as principal of a public school, but who has since been employed in evening school work, is not eligible for retirement under the provisions of St. 1913, c. 832.

2. — Substitute . . . 340

Only such substitute teachers as are duly elected and regularly employed on a salary are entitled to participate in the teachers' retirement fund, under St. 1913, c. 832.

3. — Duty of State Board of Education to assist in procuring Positions . . . 578

The duty imposed by St. 1911, c. 731, as amended by St. 1913, c. 368, upon the State Board of Education to assist teachers in securing positions is limited to positions within this Commonwealth.

TEXTILE SCHOOLS . . . 264

See EDUCATION, STATE BOARD OF. 3.

THEATRE TICKETS — Constitutional Law — Police Power — Regulation of Sale of . . . 519

A bill seeking to regulate the prices at which and the places where theatre tickets may be sold is not a valid exercise of the police power, and therefore would be unconstitutional if enacted.

A bill providing that no theatre tickets shall be sold unless a seat is available at the time of the sale would be a constitutional exercise of the police power as protecting the public against fraud.

2. — Constitutional Law — Corporations — Regulation of Sale of . . . 529

There is no constitutional objection to a law amending the charter of domestic corporations organized since 1831, engaged in the theatre business, by stipulating in what manner theatre tickets shall be sold by them, nor to making it a condition to the doing of such business in this Commonwealth by foreign corporations that such corporations shall sell their tickets in the manner so stipulated.

TICKETS — Places of Amusement — Regulation of Sale . . . 207
See CONSTITUTIONAL LAW. 17.

TIDE-WATERS — Authority of Harbor and Land Commissioners to grant Licenses to build Structures 525

The authority of the Board of Harbor and Land Commissioners to license, with the approval of the Governor and Council, under R. L., c. 96, § 17, the building of structures in tide-water is not strictly limited by § 22, but the last-mentioned section indicates only the legislative policy in regard to such licenses and the legislative intent as a guide to the courts in construing such licenses.

TITLE INSURANCE — Guaranty Fund
— Investment — Mortgages —
Stock in Trade — Trading Capital . . . 114
See INSURANCE. 3.

TOWN NOTES — Certification of —
Bureau of Statistics . . . 149

Under St. 1913, c. 719, the director of the Bureau of Statistics may certify notes of a fire district where the district has complied with the spirit and purpose of the statute, even though statutory language was not followed in the vote providing for such notes.

TRACKLESS TROLLEY — Operation of 465
See BUSINESS CORPORATION.

TRADING STAMPS — Constitutional
Law — Police Power — Power
of State to prohibit the Use of . . . 557

Senate Document No. 438, which prohibits the selling or giving, in connection with the sale of any article of merchandise, of any trading stamps or similar devices entitling the holder to either a cash or property premium, would be unconstitutional if enacted, inasmuch as the bill prohibits the giving of a cash premium to be paid by the seller independently of any arrangement by him with any other person, *i.e.*, a discount. But *it seems* it would be within the constitutional power of the Legislature to prohibit the dealing in trading stamps or similar devices in which any person other than the vendor or vendee of the merchandise sold has an interest.

— Excise Tax — License Fee . . . 215
See CONSTITUTIONAL LAW. 18.

TRAFFIC REGULATIONS — Violation
of — Conviction of Crime . . . 490
See CONVICTION.

TRANSFER — District Police — Re-
transfer . . . 117
See DISTRICT POLICE.

TRANSPORTATION — Of Intoxicating
Liquors into No-license Municipalities — Time for granting Permits . . . 430
See INTOXICATING LIQUORS. 4.

TRANSPORTATION OF PUPILS —
Preceding Year . . . 159
See EDUCATION, STATE BOARD OF. 1.

TREASURER AND RECEIVER-GENERAL — Bonds — Names of
Purchasers . . . 194

The Treasurer and Receiver-General is not required to disclose the names of purchasers of State bonds.

TRESPASS — Access to Great Ponds . . . 639
See GREAT PONDS.

TRUST COMPANY — Savings Department — Loan to Single Individual . . . 8

The limitation in section 34 of chapter 116 of the Revised Laws, relating to trust companies, that "the total liabilities of a person . . . for money borrowed . . . to such corporations having a capital stock of five hundred thousand dollars or more shall at no time exceed one-fifth part of the surplus account and of such amount of the capital stock as is actually paid up," is inconsistent with the subsequent provision in St. 1908, c. 590, § 68, regulating the investment of deposits in savings banks and the income thereof, that such deposits and income may be invested "in loans of the classes hereafter described, payable and to be paid or renewed at a time not exceeding one year from the date thereof; but not more than one-third of the deposits and income shall so be invested, nor shall the total liabilities to such corporation of a person, partnership, association or corporation for money borrowed upon personal security . . . exceed five per cent of such deposits and income," which provision is made applicable to the savings departments of trust companies by St. 1908, c. 520, § 2, and with respect to deposits and income in the savings department of a trust company is repealed by the provision in section 16 of the latter statute that "all acts and parts of acts inconsistent herewith are hereby repealed." It follows that the deposits and income in the savings department of such trust company may be loaned to a person, partnership, association or corporation to the amount of 5 per cent. of such deposits and income, provided that the borrower is not otherwise indebted to the trust company. If, however, a person, partnership, association or corporation borrows to the extent of 5 per cent. of such deposits and income, no further loans may be obtained from the corporation either in its savings department or in its commercial department; and if the loan has already been secured through the commercial department in accordance with the provisions of R. L., c. 116, § 34, the amount so obtained must be considered in determining the amount of any loan from the savings department so that the combined sum of the indebtedness shall not exceed 5 per cent. of the deposits and income of the savings department.

2. — Use of word "Bank" as part of
Business Name . . . 190

There is no statutory prohibition of the use of the word "bank" as a part of the business name of a trust company.

TUITION — Domicil of Parent . . . 340
See SCHOOLS. 3.

TUITION OF NONRESIDENT PUPILS — Public Schools . . . 331
See SCHOOLS. 2.

TUNNEL TOLLS — East Boston — Boston Elevated Railway Company — Security for Bonds of City of Boston — Substitution of Annual Appropriation — Impairment of Obligation of Contract . . . 33
See CONSTITUTIONAL LAW. 4.

TYPEWRITTEN SIGNATURE — Corporations — Contracts — Tests of Samples . . . 130
See CORPORATIONS.

VACCINATION — Certificates of Exemption — Requisites . . . 625
Under R. L., c. 44, § 6, as amended by St. 1907, c. 215, providing for exemption from vaccination of children attending public schools upon a certificate signed by a regular practising physician that the child "is not a fit subject for vaccination," with the "cause stated therein," it is not necessary for the physician to emphasize further in his certificate that this is his opinion or that the cause stated is, in his opinion, sufficient to justify his statement; nor is it necessary that the physician signing such a certificate make a personal examination of the child.

VEHICLES — Regulation of Traffic — City and Town — Massachusetts Highway Commission — Approval . . . 7
See CITIES AND TOWNS. 1.

VETERAN — Service of the Commonwealth — Retirement — Elective Officer . . . 54
The provision of St. 1907, c. 458, § 1, that "a veteran of the civil war in the service of the Commonwealth, if incapacitated for active duty, shall be retired from active service, with the consent of the governor, . . ." does not apply to elective officers and therefore does not include registers of probate.

2. — Gratuities — Re-enlistment as Substitute . . . 287
Under St. 1912, c. 702, as amended by St. 1913, c. 443, a Massachusetts veteran who served as a volunteer in the civil war and was honorably discharged is not debarred from receiving a gratuity from the Commonwealth by reason of subsequent service as a substitute.

3. — Relief — Liability of Children for Support . . . 613
The relief provided for veterans and their families by R. L., c. 79, § 18, as amended by Gen. St. 1916, c. 116, § 1, is available independently of Gen. St. 1915, c. 163, § 1, imposing a liability upon children of sufficient means to provide for their destitute parents.

WAGE BOARD — Authority to establish — Effect of Change in Statutory Method of Selection . . . 447
See MINIMUM WAGE COMMISSION. 1.

WAGES — Male Laborers — Reformatory for Women . . . 489
See PRISON COMMISSIONERS, BOARD OF. 2.

WARDS — Division into Precincts — Time for Action . . . 468
See CITIES AND TOWNS. 8.

WATER PIPES — Highways — Grant by Selectmen . . . 342
See PUBLIC INSTITUTIONS.

WEIGHTS AND MEASURES — Weighing and Measuring Devices for Hire or Reward — Testing and sealing Gas or Electric Light Meters . . . 86
Gas or electric light meters are not measuring devices within the meaning of St. 1909, c. 412, § 1, that "the provisions of chapter sixty-two of the Revised Laws relating to the adjustment, testing and sealing of weights, measures and balances shall apply to all weighing and measuring devices used for the purposes of weighing and measuring for hire or reward."

2. — Prosecutions for Violations of Law — Procedure . . . 618
A prosecution may be instituted by the Commissioner of Weights and Measures for a violation of St. 1907, c. 394, without giving the parties concerned notice and an opportunity to be heard.

WEIGHTS AND MEASURES, SEALER OF — Signature . . . 316
The signature of sealers or deputy sealers of weights and measures on sealed scales should be in the handwriting of the officer who affixes the seal, and not a printed facsimile of his signature.

— Civil Service . . . 127
See CIVIL SERVICE. 1.
— Lowell . . . 213
See CIVIL SERVICE. 6.

WEYMOUTH BACK RIVER — Attorney-General — "Cost and Expenses" Incidental to Construction of Bridge — Apportionment between Commonwealth and Counties of Norfolk and Plymouth — Discount or Interest on Loans . . . 63
In St. 1911, c. 739, as amended by St. 1912, c. 227, which established a commission to build a bridge over Weymouth Back River, the expense thereof to be apportioned between the Commonwealth and the counties of Norfolk and Plymouth, the words "cost and expenses," as used in section 7, providing that "the cost and expenses incurred under the provisions of this act . . . shall be borne as follows: forty-five per cent by the commonwealth of Massachusetts, twenty per cent by the county of Norfolk, twenty per cent by the county of Plymouth, . . ." do not include interest on money borrowed by said counties.

WITNESSES — Power of State Board of Labor and Industries to Summon 565

Under an order passed by the House of Representatives requiring the State Board of Labor and Industries to inquire as to whether certain telegraph operators were discharged by a telegraph company because they were members of a union, such board does not have the power to summon witnesses and require the production of books and papers in relation thereto.

WORKMEN'S COMPENSATION ACT

— Cities and Towns — Gypsy and Brown-tail Moth Suppression — Injury to Workmen — Compensation 256

The Commonwealth is not required to reimburse cities and towns which have adopted the workmen's compensation act and have incurred expenses on account of injuries sustained

WORKMEN'S COMPENSATION ACT

— *Continued.*

by employees while employed in the suppression of gypsy and brown-tail moths.

2. — Applicability to Commonwealth . 590

Laborers, workmen and mechanics in the employ of the Commonwealth are not deprived of the benefits of the workmen's compensation act by Gen. St. 1916, c. 307.

WRENTHAM STATE SCHOOL —

Rights of Trustees in Mail addressed to Inmates 219

Trustees of the Wrentham State School may exercise discretion in preventing delivery of objectionable mail to inmates.

Valuable enclosures in mail addressed to inmates of the Wrentham State School must be delivered or returned.

